STATE OF MICHIGAN

COURT OF APPEALS

RIMA JABER,

Plaintiff-Appellee,

v

MEIJER GROUP, INC.,

Defendant-Appellant.

UNPUBLISHED
August 20, 2020

No. 348158
Wayne Circuit Court
LC No. 17-010608-NO

Before: GLEICHER, P.J., and STEPHENS and CAMERON, JJ.

PER CURIAM.

Defendant appeals by leave granted[1] the order denying defendant's motion for summary disposition with respect to plaintiff's premises liability claim. We affirm in part, reverse in part and remand.

I. BACKGROUND

This case arises from an incident that occurred on May 2, 2016, at the Meijer store in Allen Park, MI. While plaintiff was shopping, she slipped in a puddle of water in a grocery aisle, fell backward, hit her head, and lost consciousness. When plaintiff regained consciousness, she noticed that most of the water from the floor was absorbed into her long dress. James Chartrand (Chartrand), the grocery team leader at defendant's store, arrived at the area where plaintiff fell, and observed plaintiff on the floor. He testified at his deposition that he "couldn't see the water or anything at that point." Chartrand later noticed water was leaking from the "parmesan cheese cooler." At her deposition, plaintiff was asked, "Do you think if you were looking, you'd see the water." Plaintiff responded, "I think so."

Plaintiff filed a complaint alleging negligence on the basis of premises liability. Defendant filed a motion for summary disposition under MCR 2.116(C)(10), asserting that the puddle on the

[1] *Jaber v Meijer Group, Inc*, unpublished order of the Court of Appeals, entered July, 3, 2019 (Docket No. 348158).

floor was open and obvious because plaintiff testified that if she was looking at the floor before she fell, she would have seen the puddle. Defendant further asserted that it did not have actual or constructive notice of the puddle.

The trial court issued an opinion and order denying defendant's motion for summary disposition with respect to plaintiff's premises liability claim. Defendant unsuccessfully filed a motion for reconsideration. This appeal followed.

II. STANDARD OF REVIEW

"[T]he existence of a legal duty is a question of law for the court to decide." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685; 822 NW2d 254 (2012), (quotation marks and citation omitted). This Court reviews de novo a trial court's decision to grant or deny summary disposition. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). Defendant moved for summary disposition under MCR 2.116(C)(10). Summary disposition under MCR 2.116(C)(10) is appropriate where "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "[T]he circuit court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). "[R]eview is limited to the evidence that has been presented to the circuit court at the time the motion was decided." *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009), citing *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). "Courts are liberal in finding a factual dispute sufficient to withstand summary disposition." *Innovative Adult Foster Care, Inc*, 285 Mich App at 476.

III. PREMISES LIABILITY

Defendant asserts the trial court erred in denying defendant's motion for summary disposition because the puddle was open and obvious, and was not unavoidable or unreasonably dangerous. We agree in part, and disagree in part.

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was a proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Benton v Dart Props, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006). The duty that an owner or occupier of land, or cooperative association owes to a visitor depends on the status of the visitor at the time of the injury. *Id.* "A person invited on the land for the owner's commercial purposes or pecuniary gain is an invitee[.]" *Id.* It is undisputed that plaintiff went to defendant's store for a commercial purpose, to buy snacks for her children, and therefore, was on defendant's land as an invitee. *Id.*

"With regard to invitees, a landowner owes a duty to use reasonable care to protect invitees from unreasonable risks of harm posed by dangerous conditions on the owner's land." *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012). "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." *Pugno v Blue Harvest Farms, LLC*, 326 Mich App 1, 12; 930 NW2d 393 (2018) (quotation marks and citation omitted). In addition, the plaintiff "must be able to prove that the premises possessor had actual or constructive notice of the dangerous condition at issue." *Id*. (quotation marks and citation omitted).

However, "[t]he possessor of land owes no duty to protect or warn of dangers that are open and obvious because such dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid." *Hoffner*, 492 Mich at 460-461 (quotation marks and citation omitted). "Indeed, there is an overriding public policy that people should take reasonable care for their own safety and this precludes the imposition of a duty on a land lord to take extraordinary measures to warn or keep people safe unless the risk is unreasonable." *Buhalis*, 296 Mich App at 693-694. "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." *Hoffner*, 492 Mich at 461. "Our Supreme Court has explicitly cautioned that when applying this test, it is important for courts . . . to focus on the objective nature of the condition of the premises at issue, not the subjective degree of care used by the plaintiff." *Price v Kroger Co of Mich*, 284 Mich App 496, 501; 773 NW2d 739 (2009), (quotation marks and citation omitted). Therefore, "[t]he proper question is not whether *this plaintiff* could or should have discovered the [hazard], but whether the [hazard] was observable to the average, casual observer." *Id*.

"Yet, as a limited exception to the circumscribed duty owed for open and obvious hazards, liability may arise when *special aspects* of a condition make even an open and obvious risk unreasonable." *Hoffner*, 492 Mich at 461. "[T]o prevent application of the open and obvious danger doctrine to a typical and obvious condition, the condition must be 'effectively unavoidable' or 'unreasonably dangerous because of special aspects that impose an unreasonably high risk of severe harm.' " *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 716; 737 NW2d 179 (2007), quoting *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 518; 629 NW2d 384 (2001). Therefore, when "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*, 464 Mich at 517.

In denying defendant's motion for summary disposition, the trial court correctly determined that a question of fact existed regarding whether the puddle was open and obvious, stating "[e]ven if [p]laintiff had casually looked at the water, there is a question as to whether she would have seen it because of the clear nature of the liquid against a white floor." In support of this we note that the defendant's manager did not observe the water when he first approached the accident scene. Plaintiff slipped and fell on a puddle while grocery shopping at defendant's store. Plaintiff testified that she did not see the puddle before she fell, but stated that she believed she would have noticed the puddle of water if she had looked at the ground before she fell. Plaintiff testified that the "floor was full of water," and that the puddle was large enough to soak her long dress "up to the middle" of her back after she fell. However, the issue here is whether the water was observable upon ***casual*** not focused attention..

This Court has held that a hazard that is readily observable after the plaintiff has fallen constitutes an open and obvious condition. *Kennedy*, 274 Mich App at 710. For example, in *Kennedy*, the plaintiff slipped on crushed grapes that the plaintiff claimed were "inconspicuous

against the backdrop of the beige supermarket floor." *Id*. at 713. This Court determined the grapes were an open and obvious condition because the plaintiff testified the grapes were readily observable after he fell, and that several other people "noticed the existence of the crushed grapes and grape residue once they actually looked at the floor." *Id*. at 713. Therefore, on the basis of plaintiff's testimony "that he would have noticed the potentially hazardous condition had he been paying attention," this Court held the grape residue was open and obvious as a matter of law. *Id*.

Like the plaintiff in *Kennedy*, plaintiff testified that she believed she would have noticed the puddle if she had looked at the ground before she fell. Whether plaintiff saw the puddle before she fell is irrelevant to whether the condition was open and obvious. Instead, the test for a hazard being open and obvious is dependent on whether "an average person with ordinary intelligence would have discovered it upon casual inspection." *Hoffner*, 492 Mich at 461. Plaintiff testified the "floor was full of water," and the puddle was large enough to soak her long dress. Indeed, Chartrand testified that although he did not see the puddle initially, he did notice it later when he looked at the floor, rather than the plaintiff lying on the floor. From this record, we cannot say that the trial court erred.

Because we find a question of fact as to the open and obvious nature of the puddle, we need not address whether the puddle was unavoidable or unreasonably dangerous. However for completeness, we address that issue and find that it was not.

"[T]he general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but, 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*, 464 Mich at 517. In *Lugo*, the Michigan Supreme Court explained:

> An illustration of such a situation might involve, for example, a commercial building with only one exit for the general public where the floor is covered with standing water. While the condition is open and obvious, a customer wishing to exit the store must leave the store through the water. In other words, the open and obvious condition is effectively unavoidable. Similarly, an open and obvious condition might be unreasonably dangerous because of special aspects that impose an unreasonably high risk of severe harm. To use another example, consider an unguarded thirty foot deep pit in the middle of a parking lot. The condition might well be open and obvious, and one would likely be capable of avoiding the danger. Nevertheless, this 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. In sum, only 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. [*Id*. at 518-519.]

In denying defendant's motion for summary disposition, the trial court stated that "because of the clear nature of the water, the slipping hazard may be unavoidable or unreasonably dangerous." This conflates the issues of whether the puddle was readily observable upon casual observation with whether the hazard was effectively unavoidable. There is nothing in the record to support the conclusion that the plaintiff was required to step through the puddle area because she had no other method of removing herself from the aisle or for any other reason. Plaintiff

testified that she believes she would have noticed the puddle if she had looked at the floor before falling. It follows that if plaintiff had noticed the puddle before she slipped and fell, she would have been able to step around the puddle. Therefore, the puddle was not effectively unavoidable. Moreover, puddles are an "everyday occurrence" that are not generally dangerous conditions that pose an unreasonable risk of harm. *Lugo*, 464 Mich at 523. The trial court did not describe anything unusual about the puddle to support its conclusion that the puddle was unreasonably dangerous. The record does not contain anything upon which this Court could find the puddle to create a higher degree of risk than any other puddle.

IV. ACTUAL OR CONSTRUCTIVE NOTICE

Defendant further claims the trial court erroneously determined that plaintiff was not required to establish that defendant had notice of the puddle because defendant created the dangerous situation. We agree.

An invitor is liable when an unsafe condition "is known to the storekeeper or is of such a character or has existed a sufficient length of time that he should have knowledge of it." *Carpenter v. Herpolsheimer's Co*, 278 Mich 697, 698; 271 NW 575 (1937). Constructive knowledge may be. inferred when "[the condition] is of such a character or has existed a sufficient length of time that [the defendant] should have had knowledge of it." *Hampton v Waste Mgt of Michigan, Inc*, 236 Mich App 598, 604; 601 NW2d 172 (1999) (citations omitted). "Generally, the question of whether a defect has existed a sufficient length of time and under circumstances that the defendant is deemed to have notice is a question of fact, and not a question of law." *Banks v Exxon Mobil Corp*, 477 Mich 983, 984; 725 NW2d 455 (2007).

To defeat summary disposition in a premises liability case when a defendant alleges a lack of notice, a plaintiff must present some evidence that the defendant had actual or constructive notice of the dangerous condition. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 10; 890 NW2d 344 (2016). Here, plaintiff presented no evidence supporting a reasonable inference that the water had been on the floor for more than a minute, more than an hour, or half the day. For this reason, summary disposition in defendant's favor was warranted. The trial court relied on this Court's holding in *Williams v Borman's Food, Inc*, 191 Mich App 320, 321; 477 NW2d 425 (1991), to determine that plaintiff was not required to show that defendant had notice of the puddle because defendant created the dangerous condition. First, defendant argues that *Williams* was wrongly decided. MCR 7.215(J)(1) provides that "[a] panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule." This Court issued its decision in *Williams* in 1991, and the decision has not been reversed or modified. Therefore, defendant's argument is without merit on this basis. Second, defendant argues plaintiff is unable to establish active negligence as a matter of law. We agree.

In *Williams*, 191 Mich App at 321, this Court held that proof of notice is unnecessary where the dangerous condition is a result of a defendant's active negligence. This Court explained that "[a]ctive negligence exists where a defendant or his agents have created a dangerous condition." *Id*. The hazardous condition was caused by a leak underneath the parmesan cooler. Defendant argues that it did not actively cause the parmesan cooler to leak. Instead, the leak was a result of defendant's passive failure to inspect and maintain the parmesan cooler.

In *Williams*, the plaintiff slipped and fell in a puddle of water in the defendant's grocery store. *Id*. at 321. It was established "there was a drainage system under the produce tables but no procedure for regular inspection of the system." *Id*. Clearly a storeowner has a duty to inspect the premises. However, the leak in this case was due to a failure of an installed drainage system in the cooler. The record in this case does not establish either how long the leak existed nor what the inspection schedule was for the aisle at issue. Mere failure to discover a problem with the drainage system does not create active negligence and, therefore, obviate the need for notice. Therefore, we agree that the trial court erred in failing to grant summary relief based upon a lack of proof on notice.

V. ORDINARY NEGLIGENCE

Defendant also claims the trial court made conflicting statements regarding whether plaintiff's claim sounds in premises liability or ordinary negligence. We disagree.

"Michigan law distinguishes between claims arising from ordinary negligence and claims premised on a condition of the land." *Buhalis*, 296 Mich App at 692. "If the plaintiff's injury arose from an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence; this is true even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury." *Id*. Plaintiff alleges her injury arose from a dangerous condition on defendant's premises, and, therefore, her claim sounds in premises liability. *Id*.

While Count I of plaintiff's complaint is titled "Negligence," "[c]ourts are not bound by the labels that parties attach to their claims." *Buhalis*, 296 Mich App at 691. Instead, "the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Id*. at 691-692 (quotation marks and citation omitted). Plaintiff agrees that her claim sounds only in premises liability.

Still, defendant argues the trial court made conflicting statements regarding whether plaintiff's claim sounds in premises liability or ordinary negligence, and, therefore, this Court should remand the matter, and instruct the trial court to strike the portions of the opinion which suggest plaintiff has stated an ordinary negligence claim. In its opinion denying defendant's motion for summary disposition, the trial court properly concluded that plaintiff's claim sounded in premises liability. Because the trial court properly concluded plaintiff's claim sounded in premises liability, remand is not necessary to establish a clear record.

VI. CONCLUSION

We affirm the trial court's denial of summary disposition on the ground that a question of fact exists as to whether the puddle was open and obvious. We reverse the trial court's denial of summary disposition on grounds that the puddle was effectively unavoidable or unreasonably dangerous, and whether proof of notice was required. This matter is remanded to the trial court for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Cynthia Diane Stephens

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CAMERON, J. (*concurring*).

Plaintiff failed to produce any evidence that defendant had notice of the puddle of water before plaintiff's fall. This failure is fatal to plaintiff's premises liability claim. See *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 10; 890 NW2d 344 (2016). Thus, I agree with the majority that summary disposition in favor of defendant should have been granted.

Because this issue determines the outcome of this appeal, I do not believe that there is any need to address, let alone decide, a second potential deficiency in plaintiff's claim—that is, whether the puddle was an open and obvious danger. The majority elects to do so and concludes that "a question of fact" exists regarding whether the puddle was open and obvious. On this issue alone, I disagree.

In my opinion, the puddle of water in the grocery store aisle was an open and obvious hazard. Plaintiff testified that after she fell, her floor-length dress was "full of water," from the bottom of her dress up to the middle of her back. Although she did not recall seeing water on the floor before or after she fell, she conceded that there must have been "a lot of water" on the floor before she fell and insisted that "the floor was full of water." Plaintiff's concession concerning the large volume of water on the floor is understandable considering the extensive saturation of her floor-length dress. No other evidence was adduced during discovery regarding the size of the puddle of water, leaving the trial court with only plaintiff's assertion that she slipped and fell on a floor "full of water" that was ultimately absorbed by plaintiff's long dress. Plaintiff also thought that she would have seen the puddle if she had been looking. Although James Chartrand did not see the puddle when he first arrived to assist plaintiff, Chartrand testified that he noticed that water

was on the floor after he "took care of the incident." Thereafter, Chartrand determined that a "catch pan" that was located on top of a cooler "was overflowing." In light of this testimony, I would conclude that the puddle was an open and obvious hazard that was visual upon casual inspection.

/s/ Thomas C. Cameron