STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH W. SIDOROWICZ,

Plaintiff-Appellant,

v

CHICKEN SHACK, INC.,

Defendant-Appellee.

UNPUBLISHED
January 17, 2003

No. 239627
Macomb Circuit Court
LC No. 01-000395-NO

Before: Murray, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting defendant's motion for summary disposition in this negligence action. We affirm.

This action arises as a consequence of plaintiff allegedly sustaining injuries when he slipped and fell on a wet bathroom floor at defendant Chicken Shack, Inc. Plaintiff filed this premises liability action that was subsequently dismissed by the trial court pursuant to MCR 2.116(C)(10) on the grounds that the wet floor constituted an open and obvious condition from which defendant had no duty to protect plaintiff and that no evidence was introduced to permit a finding that the condition existed a sufficient length of time that defendant should have had knowledge of it.

I

At the relevant time, plaintiff was a twenty-seven year old male suffering from multiple sclerosis who was legally blind due to the multiple sclerosis. On July 18, 2000, at approximately 1:00 p.m., plaintiff, his fiancé, his fiance's 7-year-old son, and plaintiff's eight-year-old brother went to defendant Chicken Shack for lunch. Plaintiff alleged in his complaint that he was a "reasonably strong and healthy person" who was severely injured when he slipped and fell due to water on the floor in the men's restroom. Plaintiff alleged that defendant breached a duty to plaintiff by:

> (a) Negligently maintaining a dangerous and defective condition on a portion of the premises where it knew or should have known invitees would traverse;
>
> (b) Failing to keep the rest room floor area in a safe condition;

(c) Failing to take precautionary measures to correct or alleviate the unsafe condition created by the water on the floor;

(d) Failing to inspect said premises for dangerous conditions and failing to warn Plaintiff and others similarly situated of the unsafe condition created by the water on the floor, after such time as Defendant knew or could reasonably have known of the unsafe condition;

(e) Failing to provide warning signs;

(f) Creating a dangerous condition by improperly maintaining the premises;

(g) Performing other acts of negligence not yet known by Plaintiff but which will be ascertained during the discovery of said litigation.

Plaintiff testified in his deposition that he suffers from multiple sclerosis (MS). He indicated that the MS causes him to shake, gives him mood swings, and has caused him to become legally blind. He wears glasses that allow him to see "outlines" and to watch television at a close distance. At the time of the fall, he walked with a cane.

Plaintiff testified that his brother and his fiancé's son entered the restroom ahead of him and were washing their hands when he walked in. Plaintiff indicated that he slipped on the restroom floor "right at the entrance" and that his head hit the wall, then the handicap metal bar, and then the floor. He testified that there was "at least a quarter inch of water on the floor" and that he had no idea how long the water had been on the floor. When he got up off the floor, his shorts were wet. Plaintiff denied asking for a cup of water before entering the restroom and denied carrying a cup of water into the restroom. He also denied sending someone to the car for his cane after the fall.

An employee of defendant testified that Chicken Shack has a restroom for male employees and a restroom for female employees. The restrooms are not open to the public. However, an employee can use an access button to allow patron's access to the restroom. The employee testified that she did not fill out an injury form after plaintiff's fall because plaintiff indicated that he was not hurt. She testified that plaintiff's left side was wet "just up high around the hip." After the fall, the employee inspected the bathroom and discovered a little bit of water, "just a little spot, probably like a cup of water." The employee testified that the bathrooms are inspected three times a day, at approximately 9:00 a.m., 3:00 p.m., and 8:00 p.m. She indicated that if an employee used the restroom and noticed a spill on the floor, the employee would notify her or else mop the floor.

II

This Court reviews a trial court's grant of a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a motion brought under MCR 2.16(C)(10), the documentary evidence is considered in a light most favorable to the nonmoving party to determine whether the movant is entitled to judgment as a

matter of law or whether a genuine issue of material fact exists. *Ritchie-Gamester v Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

Plaintiff argues that the hazardous condition was not open and obvious to him because he is legally blind. However, the Michigan Supreme Court has rejected plaintiff's argument. There is no dispute that landowners have a legal duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition on the land that the owners know 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). However, a premises owner does not have a duty to protect invitees from open and obvious dangers unless special aspects of that condition posed an unreasonable risk of harm. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001). Special aspects that serve to remove a condition from the open and obvious danger doctrine are those that "give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided." *Id.* at 519. In applying this standard, the *Lugo* Court noted that:

> In considering whether a condition presents such a uniquely dangerous potential for severe harm as to constitute a "special aspect" and to avoid barring liability in the ordinary manner of an open and obvious danger, it is important to maintain the proper perspective, which is to consider the risk posed by the condition *a priori*, that is, before the incident involved in a particular case. It would, for example, be inappropriate to conclude in a retrospective fashion that merely because a particular plaintiff, in fact, suffered harm or even severe harm, that the condition at issue in a case posed a uniquely high risk of severe harm. This is because a plaintiff may suffer a more or less severe injury because of idiosyncratic reasons, such as having a particular susceptibility to injury or engaging in unforeseeable conduct, that are immaterial to whether an open and obvious danger is nevertheless unreasonably dangerous. [*Id.* at 519, n 2.]

By focusing on the unsafe condition before the plaintiff is injured, the *Lugo* Court rejected any consideration of "special aspects of the plaintiff."[1] Applying this analytical approach to an ordinary pothole, the court reemphasized the focus on the condition and not the plaintiff and stated that "an 'ordinarily prudent' person would typically be able to see the pothole and avoid it." *Id.* at 520.

Viewing the facts in the light most favorable to plaintiff, the unsafe condition consisted of water on the floor in the men's restroom. Plaintiff was unable to see this condition because of his blindness, but this condition would have been open and obvious to an ordinarily prudent person. No evidence has been presented indicating that the "special aspects" of the unsafe condition would remove this case from the open and obvious doctrine. Hence, plaintiff failed to show that defendant should have expected plaintiff would not discover the unsafe condition or fail to protect himself from it.

[1] In *Lauff v Wal-Mart Stores, Inc*, 2002 US Dist LEXIS 19080, the United States District Court for the Western District of Michigan, Southern Division, ruled that special aspects of the invitee, namely blindness, are immaterial to whether an open and obvious danger is unreasonably dangerous.

We need not address the remaining issue because this case has been fully resolved by our decision on the open and obvious danger issue.[2]

Affirmed.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald

[2] We note, however, that plaintiff presented no evidence with regard to how long the unsafe condition existed in the men's restroom and failed to demonstrate that defendant knew or should have known about the unsafe condition.