STATE OF MICHIGAN

COURT OF APPEALS

ILENE PERNELL, Plaintiff-Appellant,	UNPUBLISHED April 23, 2013
v	No. 308731 Oakland Circuit Court
SUBURBAN MOTORS COMPANY, INC., Defendant-Appellee.	LC No. 2011-117193-NO

Before: CAVANAGH, P.J., and SAAD and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) in this slip and fall case. We reverse and remand for further proceedings consistent with this opinion.

Plaintiff slipped and fell in the service bay of defendant's automobile dealership. She had driven to the dealership for service. While sitting in her vehicle in the service bay, she received assistance from defendant's service consultant, Ryan Ransom. Because she was going to wait in the customer service lounge while her vehicle was serviced, plaintiff got out of the vehicle. Ransom then proceeded to escort plaintiff toward the customer service lounge. She was following about a step or two behind Ransom, and was about two feet in front of her vehicle, when she suddenly fell. While she was on the floor, she noticed that her hand was wet and she had some wet spots on her clothes. Prior to that, plaintiff did not see any liquid on the floor. Ransom testified in his deposition that he only saw the wet spot on the floor after plaintiff had fallen, but "did not see it before." He testified that the wet spot was "[p]robably no bigger than a dinner plate at most." Defendant's porter, Christopher Hurd, testified that he saw plaintiff fall within a couple feet of her vehicle and that, prior to her fall, he had not seen anything on the floor. One of his duties as a porter was to routinely inspect the service area for any such defects and remedy them. After plaintiff fell, Hurd saw "some water, a small puddle of water" in the area where she fell.

Subsequently, plaintiff filed this action. Count I of her amended complaint asserted a premises liability claim arising from a dangerous condition, i.e., "an accumulation of clear water on the floor." Count II asserted a general negligence claim arising from defendant's employee's negligence in escorting plaintiff to the customer service lounge through the "accumulated clear water." Defendant moved for summary disposition of both claims pursuant to MCR

2.116(C)(10). Defendant argued that plaintiff's premises liability claim was barred by the open and obvious doctrine. Further, because plaintiff's injuries arose from a condition on the land—the puddle—and not from defendant's conduct, her "general negligence" claim sounded in premises liability and should be dismissed. Plaintiff responded that defendant failed to present any evidence that the accumulation of clear water was obvious or capable of being detected upon casual inspection. Further, plaintiff's theory of general negligence was premised on defendant's employee's negligent conduct, i.e., negligent escorting; thus, it was a viable, independent claim.

The trial court agreed with defendant and granted defendant's motion for summary dismissal. The court held that the water on the floor was open and obvious because (1) plaintiff was in "the service bay area of a car dealership where there reasonably could be an accumulation of liquid on the floor;" (2) she "could have merely looked down and seen the water prior to walking through the water;" and (3) the water did not contain any special aspects or pose a particularly severe risk of harm. Further, the court held that plaintiff could not sustain her general negligence claim "because the injury arose from a condition of the premises rather than activity conducted on the premises" and, thus, was a premises liability action. After plaintiff's motion for reconsideration was denied, this appeal followed.

Plaintiff argues that summary disposition of her premises liability claim was improper because there is a genuine issue of material fact whether the accumulation of water was open and obvious. We agree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. A reviewing court is required to view the evidence in the light most favorable to the party opposing the motion. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183.

In general, a premises owner must exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012). This duty, however, does not generally include the removal of open and obvious conditions because they do not pose an unreasonable risk of harm. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). That is, an unreasonable risk of harm does not exist if the invitee knows of the condition or it is so obvious that the invitee might reasonably be expected to discover the condition. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). "[T]he open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995). An invitee "should have discovered the condition" if "an average person with ordinary intelligence would have discovered it upon casual inspection." *Hoffner*, 492 Mich at 461.

In this case, defendant argued that the accumulation of water presented an open and obvious condition that plaintiff should have discovered because plaintiff was in the service bay area "where there reasonably could be an accumulation of liquid on the floor" and "[s]he

certainly could have looked down and seen the water prior to walking through the water." However, first, defendant presented no evidence that typical service bay areas have accumulations of liquid on the floor of which customers should be aware. In fact, defendant's employee, Ransom, testified that usually "[n]o less than four" porters work within the service bay area at one time and their primary duty is to monitor that area for such conditions. Ransom testified that: "If there is any liquid on our floors, we squeegee them immediately." Thus, while the evidence demonstrated that defendant expected dangerous accumulations of fluids to develop on the service bay area floor, there was no evidence that plaintiff, a customer at defendant's automobile dealership, would have the same expectation as defendant.

Second, defendant presented no evidence in support of its claim that plaintiff failed to look where she was walking before she slipped and fell. But more importantly, defendant presented no evidence in support of its claim that, if plaintiff had looked where she was walking, she would have discovered the accumulation of liquid. As the *Lugo* Court noted, whether a condition is open and obvious does not depend on if a plaintiff was paying attention to where she was walking; the subjective degree of care used by the plaintiff is not determinative. *Lugo*, 464 Mich at 523-524. Instead, the focus of the inquiry must be on "the objective nature of the condition of the premises at issue." *Id*. at 524.

In this case, the condition at issue was an accumulation of liquid on the floor. The accumulation was small; it was not a large pool of liquid. And the liquid was colorless clear fluid—water. Defendant's argument, taken to its logical conclusion, is that accumulations of liquid on floors are *always* observable; thus, premises owners have no duty to protect invitees from them. This proposed irrefutable presumption is untenable and inconsistent with the law. It fails to take into consideration the *particular* condition at issue and its unique qualities which may or may not make it observable or "wholly revealed by casual observation" *before* the slip and fall. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474; 499 NW2d 379 (1993). And this argument was rejected by this Court in *Watts v Michigan Multi-King, Inc*, 291 Mich App 98; 804 NW2d 569 (2010).

In *Watts*, the plaintiff slipped and fell on a wet floor in a restaurant; the floor had been mopped shortly before the fall. *Id*. at 99-100. The defendant argued that the plaintiff's claim was barred by the open and obvious doctrine, and the trial court agreed. *Id*. at 101. We reversed. In *Watts*, the plaintiff had testified that, before her fall, the floor appeared ordinary. This Court noted that:

> [d]efendant has offered no testimony or other evidence to demonstrate that the floor was visibly, let alone obviously, wet at the time of plaintiff's fall or that a reasonable person would have observed that condition on casual observation. Instead, defendant has sought to broaden the open and obvious doctrine so as to render even non-visible hazards visible. [*Id*. at 103.]
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> Defendant's contention that hazards which are not visible even to a reasonable and sighted person can still be open and obvious runs counter to the most

> fundamental principle of the doctrine, i.e., that the hazard be discoverable "upon casual inspection." [*Id*. at 104 (citation omitted).]

The *Watts* Court also soundly rejected the defendant's contention that "a wet floor in a restaurant is a common everyday hazard of which customers are expected to be aware, making it *always* open and obvious regardless of its visibility." *Id*. at 104. Such an "assumption of risk" argument was deemed inconsistent with the open and obvious doctrine. *Id*. at 105.

Here, as the moving party, defendant had the burden to support its motion under MCR 2.116(C)(10) with admissible evidence in support of its claim that undisputed factual issues demonstrated its entitlement to judgment as a matter of law. MCR 2.116(G)(3) and (4); *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 376-377; 775 NW2d 618 (2009). Defendant claimed that no genuine issue of material fact existed that the allegedly dangerous condition—the accumulation of clear water—was open and obvious. It was undisputed that plaintiff did not see the accumulation before the slip and fall, but defendant argued that plaintiff should have discovered it. See *Riddle*, 440 Mich at 96.

As in *Watts*, here defendant has presented no evidence that the small accumulation of clear water at issue in this case was observable upon casual inspection before plaintiff slipped and fell. For example, there was no evidence that it was, in fact, seen by anyone prior to the fall; thus, no inference arises that plaintiff should have seen it because other people saw it. There was no evidence of a contrast in floor color or shine resulting from the accumulation; thus, no inference arises that plaintiff should have seen it because it was plainly observable by a person approaching it. See *Watts*, 291 Mich App at 103. The fact that the accumulation of clear water was observed after plaintiff slipped and fell is irrelevant. In most, if not all, cases the cause of a slip and fall is ascertainable upon close inspection. But that is not the test for determining whether the condition was open and obvious before a slip and fall. If it was, premises owners would be granted immunity from all liability associated with slip and falls.

Here, considering the record evidence, or lack thereof as discussed above, defendant did not establish that an average person with ordinary intelligence should have discovered *this* accumulation of water upon casual inspection before plaintiff slipped and fell. See *Hoffner*, 492 Mich at 461. Accordingly, defendant was not entitled to summary dismissal of plaintiff's premises liability claim and the trial court's decision granting defendant's motion is reversed. See *Watts*, 291 Mich App at 103.

Next, plaintiff argues that the trial court erroneously dismissed her general negligence claim on the ground that it was a premises liability action. We agree.

A premises liability claim emanates from the defendant's duty as an owner, possessor, or occupier of land. *Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005). As discussed above, a premises owner 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. However, the assertion of a premises liability claim does not preclude a plaintiff from also asserting another theory of liability based on a defendant's conduct. *Id*. Here, plaintiff claimed that defendant also owed her a duty imposed by the common law "which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so

govern his actions as not to unreasonably endanger the person or property of others." *Riddle*, 440 Mich at 95, quoting *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967).

Plaintiff's general negligence claim, then, arose under the common-law, not premises liability law. That is, defendant's liability, if any, arises not because of defendant's status as an invitor, but because defendant engaged in escorting plaintiff to the customer service lounge. In particular, plaintiff is claiming that when defendant's employee was escorting her to the customer service lounge he had an obligation to use due care so as not to unreasonably endanger her. Plaintiff claimed that Ransom breached that duty when he escorted her through the service bay area knowing that potentially dangerous accumulations of fluids could be, and likely were, present because plaintiff's vehicle had been idling with its air conditioner running in the same area of the path he chose.[1] And because of Ransom's misconduct, plaintiff unexpectedly confronted a dangerous condition, slipped, fell, and suffered injuries. This is a claim based on negligent conduct independent of defendant's status as the premises owner. Accordingly, defendant was not entitled to summary dismissal of plaintiff's general negligence claim and the trial court's order granting the motion is reversed.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff is entitled to costs as the prevailing party. See MCR 7.219.

/s/ Mark J. Cavanagh
/s/ Douglas B. Shapiro

[1] The evidence demonstrated that defendant expected dangerous accumulations of fluids to develop on the service bay area floor and Ransom knew that to be true. Ransom also testified that he was "100 percent" certain that the cause of the accumulation of water at issue here was the dripping air conditioner component on plaintiff's idling vehicle. He even told plaintiff that right after she fell. Nevertheless, Ransom chose to walk plaintiff through that area.

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SAAD, J. (*dissenting*).

I respectfully dissent. The trial court ruled that a puddle of water is objectively open and obvious, regardless whether people noticed it only after plaintiff slipped on the water. This is simply a physical reality, and it holds true as much for a puddle of water as a banana peel or a parking lot curb. Simply because people may ignore something open and obvious until someone slips and, thus, draws attention to it, does not mean that the puddle or banana peel or curb only materialized after the fall. It remains true that, had someone looked down, the condition would have been apparent. Here, two employees testified that after plaintiff fell, they could clearly see the puddle of water, which was the size of a dinner plate, and plaintiff also said she could see the water after her fall. Plaintiff testified that nothing obscured her vision and no evidence suggests that something concealed the condition. Therefore, I would affirm the trial court's straightforward ruling that plaintiff's premises liability claim is barred by the open and obvious doctrine.

And, because plaintiff's claim sounds in premises liability, the trial court correctly ruled that plaintiff's negligence claim must be dismissed. The employee's actions did not cause plaintiff's fall. He and plaintiff both walked in the same direction and the employee did nothing to cause plaintiff's injury, which is premised on the condition of the premises, not the employee's conduct. Therefore, I would affirm the trial court's dismissal of plaintiff's ordinary negligence claim.

/s/ Henry William Saad