# STATE OF MICHIGAN

# COURT OF APPEALS

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| EKATERINA NOVOKSHONOVA,<br><br>Plaintiff-Appellant, | UNPUBLISHED<br>May 16, 2013 |
| v | No. 309501<br>Oakland Circuit Court |
| ROYAL OAK DINING, L.L.C., d/b/a SANGRIA,<br><br>Defendant-Appellee. | LC No. 2011-119602-NO |

Before: BORRELLO, P.J., and K.F. KELLY and MURRAY, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

This case arises from injuries sustained by plaintiff when she tripped and fell on a red table cloth on the floor of Sangria, a restaurant, bar and dance club owned by defendant. Plaintiff and her friend, Marina Jacobs, went to Sangria together. While plaintiff and Jacobs were in the dance club on the second floor of Sangria, plaintiff noticed garbage and debris on the dance floor, which she described as papers, food leftovers, a cup or glass, and bottle caps on the floor. Plaintiff was concerned about the garbage on the floor because a lot of women were wearing high heels, and plaintiff herself was wearing high-heeled boots. All evening plaintiff "was being very careful" walking around.

Approximately ten minutes before closing, plaintiff attempted to order another drink at the bar, but could not because the bar was closing. Plaintiff claimed it was dark, she could not see the floor where she was walking, and she did not look down as she walked away from the bar. She felt something soft on her foot, realized that her foot got stuck on "a cloth or something," and she could not take another step. Plaintiff tripped and fell, hitting her forehead on the bar. When the lights were turned on after plaintiff fell, plaintiff saw the red cloth and knew she had tripped on it. She stated that if she had been looking at the floor before she fell, she possibly would have been able to see the red cloth. It was only after the lights came on that Jacobs also saw a red "tablecloth or some kind of cover" between plaintiff's legs. Jacobs could not state the exact size of the red cloth but noted that it was a "big table cover or a curtain" and "definitely not a small towel."

Plaintiff filed suit against defendant for negligence, alleging that defendant's failure to protect plaintiff from the red cloth on the floor caused her to trip and fall and sustain injuries.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that the red cloth was an open and obvious condition; that defendant was not on actual or constructive notice that the red cloth was on the floor; and that plaintiff's alcohol intoxication was more than 50 percent the cause of her fall. After hearing oral argument on defendant's motion, the trial court dismissed the case pursuant to MCR 2.116(C)(10), finding no genuine issue of material fact that the hazard upon which plaintiff fell was open and obvious.[1]

On appeal, plaintiff argues that the trial court erred in granting summary disposition to defendant and dismissing her negligence claim because there is at least a question of fact as to whether the red cloth was an open and obvious danger, and even if it was an open and obvious danger, special aspects were present that rendered it unreasonably dangerous.

Summary disposition rulings are reviewed de novo. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). In a premises liability action, a plaintiff must prove: (1) duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation; and (4) damages. *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007). The threshold question is whether the defendant owed a duty to the plaintiff; this is generally a question of law for the court, and if no duty exists, summary disposition is proper. *Howe v Detroit Free Press, Inc*, 219 Mich App 150, 156; 555 NW2d 738 (1996) aff'd 457 Mich 871 (1998). "[S]ocial policy imposes on possessors of land a legal duty to protect their invitees on the basis of the special relationship that exists between them." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). "The invitor's legal duty is '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." *Id*., quoting *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988).

This duty does not extend to the removal of "open and obvious" dangers that either the plaintiff knows about or that an average person of ordinary intelligence would discover upon casual inspection. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516-517; 629 NW2d 384 (2001). The test of whether something is "open and obvious" is objective; the inquiry is not whether the plaintiff knew or should have known that the condition was hazardous, but rather "whether a reasonable person in the plaintiff's position" would have discovered the hazardous condition. *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 479; 760 NW2d 287 (2008). Even where a condition is open and obvious, if it has special aspects that render it unreasonably dangerous, the invitor still has a duty to undertake reasonable precautions to protect invitees from the risk. *Lugo*, 464 Mich at 516-517; *Joyce v Rubin*, 249 Mich App 231, 240-241; 642 NW2d 360 (2002).

[1] The trial court declined to rule on whether defendant was on notice of the red cloth's existence, and also declined to rule on the issue of plaintiff's alcohol intoxication, noting that intoxication was an issue for the jury to decide, not an issue appropriately resolved by the court on a dispositive motion.

We hold there was no duty to protect plaintiff from the red cloth on the floor because there is no genuine issue of material fact that it was an open and obvious danger, and there were no special aspects present that would render it unreasonably dangerous.

In *Kennedy*, 274 Mich App at 712, the plaintiff sustained injuries after he slipped and fell on crushed green grapes or green grape residue while shopping at the defendant's grocery store. The plaintiff argued that the crushed grapes were not an open and obvious hazard because the green and brown color of the grapes created a slipping hazard that was "inconspicuous against the backdrop of the beige supermarket floor." *Id*. at 713. The trial court ruled that the slipping hazard created by the crushed grapes or grape residue was open and obvious as a matter of law, and granted summary disposition in favor the defendant pursuant to MCR 2.116(C)(10). *Id.* at 712. This Court affirmed the trial court's ruling, noting that despite the plaintiff's claims that the grapes were inconspicuous, the plaintiff himself testified that 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. This Court emphasized that "[i]t is well settled that a party may not create an issue of material fact merely by contradicting his or her own deposition testimony." *Id*. at 714, citing *Klein v Kik*, 264 Mich App 682, 688; 692 NW2d 854 (2005) and *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480-481; 633 NW2d 440 (2001). This Court concluded that the plaintiff's own testimony established "that he would have noticed the potentially hazardous condition had he been paying attention." *Id*., citing *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 497; 595 NW2d 152 (1999).

Similarly, in the present case, despite plaintiff's claim that even with careful observation the red cloth could not be seen, plaintiff and Jacobs testified that it was readily observable after plaintiff fell. Moreover, plaintiff testified that when she was looking at the floor earlier in the evening in the darkness, she saw garbage and debris all over the floor, but that she was not looking at the floor just before she tripped on the red cloth. This demonstrates that plaintiff could have noticed the potentially hazardous condition had she been paying attention to the area where she was walking just before she tripped and fell. In fact, just like the plaintiff in *Kennedy*, plaintiff here testified that if she had been looking at the floor before she fell, she possibly would have seen the red cloth. Plaintiff cannot create an issue of material fact merely by making an argument in contradiction of her own deposition testimony. *Kennedy*, 274 Mich App at 714.

In the present case, Jacobs described the red cloth as a "big table cover or a curtain" and "definitely not a small towel." It did not matter if plaintiff did not actually see the red cloth because the test for an open and obvious danger is an objective one, and a reasonable person in plaintiff's position should have discovered the red cloth simply by looking where he or she was walking. Just as plaintiff was able to observe all of the garbage and debris on the floor earlier in the evening, a casual inspection of the floor in front of her just before she fell should have revealed the red table cloth. Thus, the hazard created by the red cloth on the floor was open and obvious as a matter of law.

Finally, there were no special aspects in this case that would render the "open and obvious" doctrine inapplicable. In *Joyce*, 249 Mich App at 241-242, this Court stated:

> In summarizing its ruling in *Lugo*, our Supreme Court specifically held that "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." [*Lugo*, 464 Mich] at 519 (emphasis added). As an example, the Supreme Court stated that, if an open and obvious hazard exists at the only exit of a commercial building, leaving the building would require an invitee to encounter the risk of harm without any alternative. *Id*. at 518. Though the condition is open and obvious, the "special aspects" of the condition would render the condition "effectively unavoidable" and therefore could constitute an unreasonably dangerous risk. *Id*. at 517-518. The *Lugo* Court also observed that even an avoidable open and obvious condition may be unreasonably dangerous if "special aspects" create a risk of death or severe injury, such as a thirty-foot-deep pit in a parking lot. *Id*. at 518.

In the present case, plaintiff testified that, earlier in the evening, even in the darkness of the dance club, she was able to observe garbage, paper, food, and bottle caps all over the floor, and was carefully walking in her high heels to avoid stepping or tripping and falling on it. Thus, plaintiff also should have been able to see and avoid the red cloth on the floor, even in the darkness of the dance club, if she had been looking down at the floor at the time she walked away from the bar. The red cloth was an avoidable open and obvious condition. Moreover, the dark red color of the cloth and the darkness in the dance club did not "create a risk of death or severe injury, such as a thirty-foot-deep pit in a parking lot." *Joyce*, 249 Mich App at 242. Just as our Supreme Court reasoned in *Lugo*, 464 Mich at 520, unlike falling an extended distance, it cannot be expected that a typical person tripping on a table cloth and falling to the ground would suffer severe injury. Therefore, the dark red cloth in the dark area of the dance club did not create an unreasonably dangerous risk.

There is no genuine issue of material fact that the red cloth on the floor of defendant's dance club was an open and obvious hazard, and the dark red color of the cloth along with the dark area of the dance club did not create an unreasonably dangerous risk. Thus, defendant did not have a duty to protect plaintiff from the red cloth on the floor, and the trial court properly dismissed plaintiff's negligence claim pursuant to MCR 2.116(C)(10).

Affirmed.

/s/ Stephen L. Borrello
/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray