STATE OF MICHIGAN

COURT OF APPEALS

LAURIE ANGER and RAYMOND ANGER, Plaintiff-Appellants,	UNPUBLISHED November 29, 2011
v	No. 299063 Macomb Circuit Court
AMERICA MULTI-CINEMA, INC., d/b/a AMC THEATRES FORUM 30, Defendant-Appellee.	LC No. 2009-003293-NO

Before: MURPHY, C.J., and BECKERING and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiffs, Laurie and Raymond Anger, appeal as of right from the trial court's order granting defendant, American Multi-Cinema, Inc., summary disposition in this premises liability action. This case arises out of injuries Laurie sustained at defendant's movie theater when she slipped and fell on a recently mopped tile floor as she walked from the self-service butter dispenser to the cashier to collect the change from her purchase at the concession stand. On appeal, plaintiffs argue that the trial court erred by dismissing their premises liability and loss of consortium claims because the danger was not open and obvious and alternatively, even if the danger was open and obvious, it was effectively unavoidable. We affirm.

I. PERTINENT FACTS

On January 16, 2009, Laurie and Raymond Anger went to defendant's movie theater in Sterling Heights, Michigan, to see a movie with their grandchildren. It was snowy outside at the time of the incident. After entering the theater and purchasing tickets, the Angers headed toward the concession stand to buy snacks for the movie. The concession area floor was tiled. At their depositions, plaintiffs testified that they did not recall seeing any wet floor signs or an employee mopping or vacuuming as they headed to the concession stand; however, Raymond recalled seeing a young man standing next to a mop bucket in the area where the carpet and tile met near the concession area.

After the grandchildren decided that they wanted popcorn, Raymond and the grandchildren went into the movie theater, and Laurie walked to a cashier in the middle of the concession area. Laurie ordered and received a bag of popcorn. Before receiving her change from the purchase, Laurie walked five to seven steps to the self-service butter dispenser to apply butter to her popcorn, which took about 15 seconds. She then turned around and took about

three to four steps back toward the cashier to collect her change. Laurie did not see yellow caution signs or employees mopping or vacuuming. She recalled seeing two other patrons in the concession area: a woman and a young girl. Laurie did not examine the floor surface before falling and could not recall if there was any kind of moisture on the floor. Laurie fell before reaching the cashier and landed on her left side, her buttock, and her hip. She did not examine the area or see what caused her fall, but she stated that "it felt wet." While on the floor, Laurie did not see any yellow caution signs or employees mopping or vacuuming. After she stood up, she asked to see a manager. When asked at deposition who she talked to about finding a manager, Laurie described a "mop person" nearby, who she described as a young male employee standing by a mop bucket. She did not recall whether he had a mop in his hand, but she testified that she did not see him before she fell. While waiting for the manager, she did not recall seeing yellow caution signs or employees mopping or vacuuming.

Defendant's former employee, Peter Gjonaj, testified at deposition that he was the individual who was mopping the floor immediately before Laurie's fall. Gjonaj testified that he placed caution signs in the concession area and began mopping on the left side of the concession area and worked his way to the right. Gjonaj mopped the area for safety and cosmetic reasons because patrons were tracking in slush and salt onto the floor.[1] Also during this time, one employee was vacuuming the carpet, and another employee was picking up items off the floor.

Notably, defendant's video surveillance system captured Laurie's fall. The video clip lasts approximately five minutes and ten seconds and shows that Gjonaj and another employee placed three yellow caution signs around the perimeter of the tiled concessions area. There was also a yellow mopping bucket in the concession area. Several patrons were in the concession area while Gjonaj mopped the floor, and as he continued to mop, the number of patrons decreased. After viewing a photograph taken from the video capture, Laurie verified that the photograph depicted yellow caution signs, a yellow mop bucket, and an employee mopping. She guessed that the caution signs were about three and one-half to four feet behind her as she stood at the cashier.

The surveillance video shows that Gjonaj was mopping before Laurie arrived in the concessions area, had stopped momentarily, and was rinsing his mop to begin wiping the floor again as Laurie entered the concessions area and headed to the middle cashier. While Laurie was ordering her popcorn, Gjonaj began mopping the tile floor in front of the concession counter immediately to the left of and slightly behind Laurie. After receiving her bag of popcorn, Laurie walked to the far right side of the concession counter toward the butter dispenser. One of the yellow caution signs stood to the right side of the butter dispensing area. After Laurie walked away from the cashier, Gjonaj moved to the middle area and began mopping where Laurie had previously been standing. After buttering her popcorn out of view of the surveillance video, Laurie can be seen walking back toward the cashier while Gjonaj mopped the floor in front of

[1] In the deposition, examining counsel highlighted that Gjonaj reported in his statement in March 2009 that he mopped because of the salt stains but did not mention slush.

and to the left of her. Nothing obstructed her view of the caution signs, mopping bucket, or Gjonaj as he stood mopping to her left. Laurie walked a few steps toward the cashier and fell.

On July 17, 2009, plaintiffs filed a premises liability claim against defendant, and on April 5, 2010, defendant moved for summary disposition pursuant to MCR 2.116(C)(10). Defendant argued that a person of reasonable intelligence would have determined upon casual inspection that the surface of the tile floor was slippery, since there were three caution signs, a yellow mop bucket, and an employee mopping in the vicinity. Defendant argued that, under the circumstances, the condition was open and obvious and defendant owed Laurie no duty. Plaintiffs opposed the motion, emphasizing that the events occurred behind Laurie after she entered the concession area. Thus, plaintiffs argued that the condition was not open and obvious and, alternatively, that it was effectively unavoidable. The trial court granted defendant's motion for summary disposition because it concluded that an average person of ordinary intelligence would have recognized the dangerous condition of the floor since an employee was mopping and there were yellow warning cones in the area. The trial court also found that there were no special aspects of the wet surface that presented a uniquely high likelihood of harm or caused it to be effectively unavoidable.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 477; 760 NW2d 287 (2008). Summary disposition is proper under MCR 2.116(C)(10) if the admissible evidence submitted by the parties shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*. A genuine issue of material fact exists when "reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). "This Court is liberal in finding genuine issues of material fact." *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008).

III. LAW & ANALYSIS

It is undisputed that plaintiff was an invitee on defendant's premises, and it is well-established that a landowner owes its invitees a duty to protect them from unreasonable risks of harm that exist from dangerous conditions on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). A landowner, however, is not "an absolute insurer of an invitee's safety." *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712-713; 737 NW2d 179 (2007). Thus, a landowner owes no duty to his invitees to remove open and obvious dangers unless there are special aspects that make those dangers unreasonably dangerous. *Lugo*, 464 Mich at 516-517. In assessing whether a dangerous condition is open and obvious, we apply an objective standard in determining whether "an average user with ordinary intelligence [would have] been able to discover the danger and the risk presented upon casual inspection." *Novotney v Burger King Corp*, 198 Mich App 470, 475; 499 NW2d 379 (1993). Therefore, a court reviewing a motion for summary disposition "focus[es] on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff." *Lugo*, 464 Mich at 523-524. If genuine issues of material fact exist regarding the condition of the premises

and whether the hazard was open and obvious, summary disposition is inappropriate. See *Bragan v. Symanzik*, 263 Mich App 324, 327-328; 687 NW2d 881 (2004).

Here, although Laurie testified that she did not notice any indicia of a dangerous condition until she got up off the floor and searched for someone so that she could file a report, review of the video that captured Laurie's fall clearly depicts the presence of several yellow caution signs, a yellow mop bucket, and Gjonaj actively mopping in the area in front of and to the side of Laurie while she stood at the concession stand. Gjonaj, the mop bucket, and the cautions signs were unobstructed from Laurie's view as she returned to the cashier after buttering her popcorn.

Plaintiffs argue that a reasonable person could not have discovered by casual inspection that the floor was recently mopped since the activity occurred behind Laurie's back.[2] Plaintiffs are correct that Gjonaj was mopping slightly behind Laurie while she stood at the concessions counter and that he mopped where she had been standing when she headed to the butter dispenser. However, before Laurie walked to the concessions counter, three yellow caution signs had been placed and were clearly visible along the perimeter of the concessions area, as was a yellow mopping bucket and Gjonaj, with mop in hand. The signs, mop bucket, and Gjonaj—now actively mopping nearby—were also clearly visible as Laurie returned for her change. Applying an objective standard to the situation, a reasonable juror would conclude that an average user of ordinary intelligence would have been able to discover the damage and risk presented upon casual inspection of the concessions area at any time during the incident in question.

Accordingly, the trial court did not err in finding that upon casual inspection an average person of ordinary intelligence would discover the slipperiness of the concession area floor and, thus, that the open and obvious doctrine applied.

Plaintiffs argue that, even if this Court finds that the slippery floor was an open and obvious condition, the trial court erred in granting defendant's motion for summary disposition because a genuine issue of material fact exists regarding whether there were special aspects of the condition, i.e., the condition was effectively unavoidable. We disagree.

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[2] Plaintiffs rely on *Watts v Mich Multi-King, Inc*, 291 Mich App 98; ___ NW2d ___ (2010), to support their argument that the wet floor was a nonvisible hazard and, therefore, not open and obvious upon casual inspection. Plaintiffs misconstrue this Court's holding and the circumstances in *Watts*. In *Watts*, this Court found that a wet floor in a restaurant is not open and obvious where there are no other indicators that signal to a reasonable person that the floor was wet. *Watts*, 291 Mich App at __. In *Watts*, there was a dispute concerning whether "wet floor" signs were placed in the area. *Id.* Moreover, this Court stated that the defendant failed to offer any "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." *Id.*

A landowner owes a duty to his invitees to remove open and obvious dangers where there are special aspects of the condition that make those dangers unreasonably dangerous. *Lugo,* 464 Mich at 517. Summary disposition is improper if "there is evidence that creates a genuine issue of material fact regarding whether there are truly 'special aspects' of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm." *Id.* An open and obvious condition poses an unreasonable risk of harm if it presents a high likelihood of harm or a high risk of severe harm. *Id.* at 518-519. An example of a special aspect of a dangerous condition that presents a high likelihood of harm is one that is effectively unavoidable. *Id.* at 518. This Court conducts an objective analysis when determining whether a special aspect exists. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 328-329; 683 NW2d 573 (2004).

Plaintiffs contend that the slippery floor was effectively unavoidable because Laurie was effectively trapped. The quintessential example of a condition that is effectively unavoidable is where there is only one exit in a building and the floor at the exit is covered in water. *Lugo*, 464 Mich at 518. In *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592-595; 708 NW2d 749 (2005), this Court concluded that an icy parking lot was effectively unavoidable because there was no alternate ice free path to take to reach the store to purchase washer fluid and the plaintiff was, therefore, effectively trapped and obligated to confront the dangerous condition. In *Joyce v Rubin*, 249 Mich App 231, 242-243; 642 NW2d 360 (2002), this Court held that, upon finding that there were available options for the invitee to travel, "no reasonable juror could conclude that the aspects of the condition were so unavoidable that [the invitee] was effectively forced to encounter the condition." Therefore, if there are alternative paths on the premises, the condition is not effectively unavoidable. *Id.*; see also *Robertson*, 268 Mich App at 593-594.

We conclude that there were no special aspects of the slippery floor that made it effectively unavoidable. The record shows that Laurie had available options to collect her change. *Joyce*, 249 Mich App at 242-243. She could have walked toward the carpeted area and to the other side of the counter or asked an employee to bring her the change. Therefore, there is no genuine issue of material fact regarding the existence of special aspects that made the slippery floor effectively unavoidable. The trial court did not err in granting defendant's motion for summary disposition.

Affirmed.

/s/ William B. Murphy
/s/ Jane M. Beckering
/s/ Amy Ronayne Krause