

STATE OF MICHIGAN
COURT OF APPEALS

TAMARA JESSEE,

Plaintiff-Appellant,

v

WALGREEN CO.,

Defendant-Appellee,

and

FRANCIS FLOOR CARE, INC.,

Defendant,

and

PAUL C. HAGADONE, doing business as
FLOOR PRO,

Defendant-Appellee.

UNPUBLISHED

October 25, 2012

No. 306563

Ogemaw Circuit Court

LC No. 10-657752 - NO

Before: RONAYNE KRAUSE, P.J., AND BORRELLO, AND RIORDAN, JJ.

PER CURIAM.

Plaintiff, Tamara Jessee, appeals as of right from the trial court's orders granting summary disposition to defendants, Walgreen Co., and Paul C. Hagadone and his business Floor Pro. We affirm.

I. FACTUAL BACKGROUND

This case arises out of an incident where Jessee fell at a Walgreen store. Jessee entered the Walgreen store to pick up a prescription. She proceeded to the pharmacy area. After she reached the pharmacy, she was asked to retrieve the original pill bottle from her car. Jessee exited the store by turning right into the main aisle and then turning left at the cosmetic counter to the exit. She did not see any water in the main aisle while exiting.

After retrieving the pill bottle, which took a couple of minutes, Jessee retraced her steps toward the pharmacy. Before turning into the middle aisle, she saw a man with a machine and

thought he was doing “floor care.” When turning at the cosmetic counter, she said she took approximately two steps on the right side of the aisle when she slipped and fell onto her back. At the time of her fall, Jessee was looking ahead to where she was going. Jessee testified that she landed in a large puddle of dirty water and explained that the Walgreen floor was light and the puddle of water was “dark grayish.”

Jessee remained on the ground for three to five minutes before individuals helped her to stand. Jessee testified that her right knee, her lower back, her right wrist, her right shoulder, part of her ribcage, and the middle finger of right hand was injured. Jessee looked to where she had fallen and could still see the puddle of water, although her clothes had soaked up some of the water. She explained that there was enough water still on the ground that if she was walking down the aisle, she would walk around it. She also claimed that she did not have enough time to see the puddle before stepping in it because the cosmetic counter blocked her view.¹

Nathaniel Hagadone, an employee of his father’s company Floor Pro, testified that he and his father were cleaning the floors at the Walgreen store at the time of Jessee’s accident. Nathaniel explained that one of the machines used in cleaning floors was a scrubber, which ejects water filled with solution, scrubs the floor, and vacuums the water back into the machine. Nathaniel admitted that the scrubber left a slim line of splattered water on either side of the machine when it was being used. Nathaniel would follow the machine when his father was operating it in order to mop up the excess water. The scrubber made a loud noise when it was being operated.

He also testified that on the day of the incident, his father used the scrubber machine and turned around with it in the main aisle. Nathaniel explained that when turning with the machine, the machine would leave a water residue, and it could possibly dispense a puddle. The puddle would be approximately the amount of water in a drinking glass, in a six-by-four rectangular area. After Jessee fell, Nathaniel mopped the area and did not recall there being any water on the floor.

The morning after the accident, Jessee sought medical treatment and eventually had surgery on her back. Jessee filed a complaint against Walgreen and Paul Hagadone and his business Floor Pro alleging that Walgreen behaved negligently in failing to keep its premises safe, failing to warn her about the puddle, and she sustained injuries because of Walgreen’s actions. Jessee contended that Hagadone and Floor Pro had a duty to warn invitees about the puddle and to place caution signs near the water and the failure to do so caused her injuries. Walgreen and Hagadone filed motions for summary disposition pursuant to MCR 2.116(C)(10), arguing that the danger was open and obvious and there was no genuine issue of material fact regarding Jessee’s claims. While Jessee argued that there was a genuine issue of material fact regarding the open and obvious doctrine and regarding whether Hagadone was entitled to raise this defense, the trial court agreed with defendants and granted their respective motions for summary disposition. Jessee now appeals.

¹ However, in her answer to Walgreen’s Interrogatories, Jessee stated that she fell at the “distant end of the cosmetic counter.”

II. SUMMARY DISPOSITION

A. Standard of Review

A grant or denial of a motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo. *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). The motion for summary disposition “tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *Id.* “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 v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing a motion for summary disposition under MCR 2.116(C)(10), a court considers “affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion.” *Greene v A P Prods, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006) (internal quotations and citations omitted). This Court considers only “what was properly presented to the trial court before its decision on the motion.” *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003).

B. Open and Obvious Doctrine

In any negligence action, a plaintiff must prove the essential four elements: duty, breach, causation, and damages. *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007). At issue in this case is the first element, whether defendants owed a duty to plaintiff. Jessee was an invitee, “which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make [it] safe for [the invitee’s] reception.” *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000) (internal quotations and citation omitted). Generally, 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.” *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001).

Pursuant to the open and obvious doctrine, however, a premises owner does not owe a duty to an invitee if the alleged danger on the property is “‘known to the invitee or [is] so obvious that the invitee might reasonably be expected to discover [it.]’” *Lugo*, 464 Mich at 516, quoting *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). “The test for an open and obvious danger focuses on the inquiry: Would an average person of ordinary intelligence discover the danger and the risk it presented on casual inspection?” *Price v Kroger Co of Mich*, 284 Mich App 496, 501; 773 NW2d 739 (2009). The open and obvious doctrine poses an objective question. *Id.* “The proper question is not whether *this plaintiff* could or should have discovered the [danger], but whether the [danger] was observable to the average, casual observer.” *Id.* (emphasis in original); see also *Bialick v Megan Mary, Inc*, 286 Mich App 359, 363; 780 NW2d 599 (2009).

The danger complained of in this case was open and obvious. Jessee’s testimony that she did not see the puddle because of the cosmetic counter is not dispositive. The proper inquiry is whether a *reasonable person* would have seen the puddle relative to its location to the cosmetic

counter, not whether Jessee saw it. Moreover, if a reasonable person could not see the puddle over the cosmetic counter before turning into the main aisle, then we must consider whether the puddle was far enough back in the aisle that a reasonable person would see it after turning into the aisle but before stepping into the wetness. This is especially true considering the relative short height of the cosmetic counter, as evidenced by pictures in the lower court record. It is evident from these pictures that the closer one approaches the cosmetic counter, the more visible the main aisle floor becomes.

Jessee admitted that the puddle was a large puddle of dirty water that contrasted with the lighter floor. She acknowledged that she saw the remnants of the puddle after her fall. In other words, she saw the puddle “once [she] actually looked at the floor.” See *Kennedy v Great Atl & Pac Tea Co*, 274 Mich App 710, 713; 737 NW2d 179 (2007) (holding that there was no genuine issue of material fact regarding the open and obvious nature of crushed grapes on a floor because a person would notice the grapes when actually looking at the floor). Jessee failed to see the puddle not because it was hidden, but because rather than looking down when walking, she was looking ahead. See *Lugo*, 464 Mich at 521-523. Thus, there is no genuine issue of material fact regarding the open and obvious nature of the puddle.

C. Special Aspects

Jessee also asserts that the puddle posed an unreasonable risk to invitees. While it is generally true that a premises owner owes no duty to invitees if the danger is open and obvious, there is an exception when “special aspects of a condition make even an open and obvious risk unreasonably dangerous[.]” *Lugo*, 464 Mich at 517. These special aspects, however, must create a high likelihood of harm or a high risk of severe harm. *Id.* at 518-519. Something is considered a special aspect if it is unusual in “character, location, or surrounding circumstances.” *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617; 537 NW2d 185 (1995) (internal quotations and citation omitted). The focus is not whether the harm was foreseeable, but whether despite its foreseeability, the harm remained unreasonable. *Singerman v Municipal Service Bureau, Inc*, 455 Mich 135, 142-143; 565 NW2d 383 (1997). An objective standard is used to determine whether there are special aspects that transform an open and obvious condition into something that is unreasonably dangerous. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329; 683 NW2d 573 (2004).

No special aspects made the puddle unreasonably dangerous. The Michigan Supreme Court’s examples in *Lugo* are instructive in this case. The Court explained that an example of a high likelihood of harm would be an unavoidable danger, such as having only one exit to a commercial building and the floor was flooded with a standing pool of water, so that a customer could not exit safely. *Lugo*, 464 Mich at 518. This bears little resemblance to this case, as it is undisputed that Jessee could have taken another route to the pharmacy. See *Joyce v Rubin*, 249 Mich App 231, 242; 642 NW2d 360 (2002) (explaining that as the plaintiff could and did walk around an icy walkway, she was not trapped and therefore no special aspect existed).

As for a high risk of severe harm, the Court in *Lugo* gave the example of an unguarded 30-foot deep pit in a parking lot. *Lugo*, 464 Mich at 518. As this Court recognized in *Joyce*, 249 Mich App at 241-242, the risk the Court was referring to was a risk of death or severe injury. While it may be true that Jessee was injured in her fall, slipping in a puddle of water is a

categorically different type of risk than a 30-foot deep pit, both in degree and nature. Thus, there is no evidence that there were special aspects.

D. Hagadone and Floor Pro and the Open and Obvious Doctrine

Lastly, Jessee contends that the defense of open and obvious was not available to Hagadone or Floor Pro, who were not the premises owner. Jessee is correct that the open and obvious doctrine only applies to premises liability actions, not ordinary negligence. See *Hiner v Mojica*, 271 Mich App 604, 615-616; 722 NW2d 914 (2006). Thus, to determine whether summary disposition was proper based on the open and obvious doctrine, a review of Jessee's complaint is necessary to determine what theory of negligence she alleged. "Courts are not bound by the labels that parties attach to their claims." *Buhalis v Trinity Continuing Care Services*, __ Mich App __; __ NW2d __ (Docket Nos. 296535, 300163, issued May 29, 2012) (slip op at 2). Furthermore, "[i]t is well settled that 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." *Adams v Adams*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007).

Instructive is this Court's opinion in *Buhalis*, involving a plaintiff who sustained an injury when slipping on ice. *Buhalis*, __ Mich App at __ (slip op at 1). This Court analyzed the difference between premises liability cases and ordinary negligence cases in the following way:

Here, [plaintiff] alleged that she was injured when she slipped on ice and fell; that is, she alleged that she was injured when she encountered a dangerous condition on [defendant's] premises. Though she asserted that [defendant's] employees caused the dangerous condition at issue, this allegation does not transform the claim into one for ordinary negligence. Rather, she clearly pleaded a claim founded on premises liability. Therefore, [plaintiff's] negligence claim is a common law premises liability claim and, to the extent that she purported to allege an ordinary negligence claim in addition to her premises liability claim, the trial court should have dismissed that claim. [*Buhalis*, __ Mich App at __ (slip op at 3).]

In sum, "[i]f the plaintiff's injury arose from an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence[.]" *Buhalis*, __ Mich App at __ (slip op at 3).

In her complaint, Jessee alleges that a dangerous condition on the land, i.e. the puddle in the aisle, caused her injuries.² She also referenced Hagadone and Floor Pro's "duty to warn invitees" several times in the complaint. This is consistent with premises liability claims, where the open and obvious doctrine applies to claims that a defendant failed to warn about a dangerous

² Jessee's claim against Walgreen, Count I of the complaint, was very similar in format and wording to her claim against Hagadone and Floor Pro, Count III of the complaint, including the reference to common law negligence.

condition. *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 495; 595 NW2d 152 (1999). Even more revealing is Jessee’s specific reference to Hagadone’s duty pursuant to the open and obvious doctrine in Count III of her First Amended Complaint, labeled “Claim Against Paul C. Hagadone D/B/A Pro Floor.” Jessee alleged that Hagadone “owed a duty to warn invitees at Defendant Walgreens store of an open and obvious danger if [Hagadone] should expect that the invitee will not discover the danger or would not protect herself against it [.]” Therefore, while Jessee also alleged in her complaint that Hagadone and Floor Pro’s behavior caused the dangerous condition, this allegation does not transform the claim into one for ordinary negligence as she clearly pleaded a claim founded on premises liability. See *Buhalis*, __ Mich App at __ (slip op at 3). Since Jessee alleged a premises liability theory of negligence against Hagadone, he and Floor Pro were entitled to raise the open and obvious defense.

III. CONCLUSION

There is no genuine issue of material fact regarding the open and obvious nature of the puddle or the lack of special aspects. Since plaintiff alleged a premises liability action against Hagadone, he was entitled to raise the open and obvious doctrine as a defense. We affirm.

/s/ Stephen L. Borrello

/s/ Michael J. Riordan