

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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BARBARA TALBOT,

Plaintiff-Appellant,

v

RT DETROIT FRANCHISE L.L.C., d/b/a RUBY  
TUESDAY,

Defendant-Appellee.

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UNPUBLISHED

April 25, 2006

No. 265726

Wayne Circuit Court

LC No. 2004-059591-NO

Before: Neff, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right the trial court order granting summary disposition in favor of defendant under MCR 2.116(C)(10). We reverse and remand for further proceedings. This case is being decided without oral argument under MCR 7.214(E).

While sitting at a booth in defendant's restaurant, plaintiff asked a waitress for the location of the women's restroom. The waitress directed plaintiff to a hallway. Plaintiff walked down the aisle and turned toward the restroom. Plaintiff claimed that she was looking straight ahead and on the floor where she was walking, and that she did not see anything on the floor. Several steps after plaintiff turned, she slipped and felt something on the heel of her shoe as she fell. As plaintiff was getting up from the fall, she discerned that she had slipped on what appeared to be water. She was "a couple inches up" from the floor when she saw the water. The water was "like a strip" approximately two to three inches in length. According to plaintiff, it was not visible before her fall because it was clear, and there was no sign warning of a wet floor. Plaintiff was uncertain of the exact location of the fall, but recalled passing a computer screen in a service area. According to a former manager of the restaurant, walking through the service area was a "normal" path by which customers accessed the restrooms. Plaintiff believed there were mats on the floor, but she did not slip while on a mat, and did not recall if she stepped on the mats at all.

The trial court held that the condition was open and obvious and granted defendant's motion for summary disposition. We review de novo a trial court's decision on a motion for summary disposition. *Lockridge v State Farm Mut Automobile Ins Co*, 240 Mich App 507, 511; 618 NW2d 49 (2000). Summary disposition may be granted under MCR 2.116(C)(10) when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law.

Invitors are not absolute insurers of the safety of their invitees. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995). “In general, a premises possessor 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). “[T]he general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk.” *Id.* at 517. Whether a hazardous condition is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger and risk presented upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). The determination depends on the characteristics of a reasonably prudent person, not on the characteristics of a particular plaintiff. See *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329 n 10; 683 NW2d 573 (2004).

In this case, the only evidence presented concerning the visibility of the condition was plaintiff’s testimony. She unequivocally stated that the clear liquid was not visible and she would not have been able to see it if she had been looking down. Defendant argues that plaintiff should have been aware that she was in a service area and foreseen that water may be on the floor. However, plaintiff was directed into this area by a waitress and was not warned that it could be hazardous. There is no evidence that an average person with ordinary intelligence would have discovered the danger and risk presented upon casual inspection. *Novotney, supra* at 474-475. Therefore, the trial court erred in determining that defendant was entitled to summary disposition because the condition was open and obvious.

In light of our conclusion that defendant was not entitled to summary disposition on the basis that the condition was open and obvious, we need not address plaintiff’s contention that the unavoidable nature of the condition constituted a special aspect that made the condition unreasonably dangerous. *Lugo, supra* at 518-519. To the extent defendant argues that its employees did not cause the hazard and did not have actual or constructive notice of the condition, this issue is not preserved because defendant did not raise this argument below. Although we may consider unpreserved issues if the question is one of law and the facts necessary for its resolution have been presented, *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98-99; 494 NW2d 791 (1992), this argument concerns a factual determination, and the necessary factual record has not been developed.

We reverse and remand for further proceedings. We do not retain jurisdiction.

/s/ Janet T. Neff

/s/ Henry William Saad

/s/ Richard A. Bandstra