

STATE OF MICHIGAN
COURT OF APPEALS

LARRY VAN WYNSBERGHE and PATRICIA
VAN WYNSBERGHE,

UNPUBLISHED
April 15, 2008

Plaintiffs-Appellants,

v

AMERICAN AXLE & MANUFACTURING
HOLDINGS, INC.,

No. 277094
Wayne Circuit Court
LC No. 05-535421-NO

Defendant-Appellee.

Before: Jansen, P.J., and Donofrio and Davis, JJ.

PER CURIAM.

Plaintiffs¹ appeal as of right an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse.

This case arises out of plaintiff's slip and fall on a sloped, coolant-covered floor at defendant's premises. Plaintiff was there as an invitee. His employer sent him to defendant's premises, at defendant's request, to help diagnose a problem with a large palletized transfer system – a rectangularly arranged group of individual machines – that plaintiff's employer had manufactured and installed on the site approximately twenty-eight years previously. Plaintiff was aware that the concrete floor was very slippery and that the entire area, but particularly the area he needed to go to inspect the machine, was covered with slick coolant. The coolant is a “milky, white substance.” Plaintiff testified that he shuffled his feet to move, and held onto another piece of equipment for stability while doing so. Plaintiff was not aware, nor had he been warned, that a portion of the floor some distance into the machine area contained a slope; he discovered the slope only after slipping on it. He testified that, other than some misting on his glasses from the coolant in the air, there was nothing that would have blocked him from seeing the slope, had he been looking for it. He further testified that he could not have conducted the necessary examination of the machinery without traversing the area. The trial court granted

¹ Because the claims of plaintiff Patricia Van Wynsberghe are derivative, we use “plaintiff” to refer only to plaintiff Larry Van Wynsberghe.

summary disposition in defendant's favor on the basis of its finding that the dangerous condition of the floor was open and obvious, and it lacked any "special aspects."

Plaintiffs first contend that the trial court erred in finding the dangerous condition of the floor – that it was more slippery than could be anticipated by plaintiff as a result of being covered with coolant and sloped – to be open and obvious. We agree with the trial court that the slippery conditions of the floor were open and obvious, but on the record before us, we find a question of fact whether the slope was open and obvious, particularly where the slope is combined with the coolant on the floor and in the air.

We review de novo a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(10). *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). We consider all documentary evidence submitted by the parties, and all reasonable inferences that can be drawn therefrom, in the light most favorable to the nonmoving party to determine whether they show that a genuine issue of material fact exists. *Id.*, 567-568. Any reasonable doubt must be resolved in favor of the nonmoving party. *West v General Motors Corp*, 467 Mich 177, 183; 665 NW2d 468 (2003). At issue is only whether there exists a genuine issue of material fact to be resolved at trial. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999).

Because plaintiff was a business invitee, defendant owed plaintiff "the highest level of protection under premises liability law" to ensure that the premises were reasonably safe. *Sitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597, 604; 614 NW2d 88 (2000). "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*, 464 Mich 512, 516; 629 NW2d 384 (2001). Nevertheless, a landowner is usually not obligated to remove a dangerous condition that is "open and obvious." *Id.* A condition is "open and obvious" when "the dangers are known to the invitees or are so obvious that the invitee might reasonably be expected to discover them, i.e., an average user with ordinary intelligence would have been able to discover the danger and risk presented upon casual inspection." *Richardson v Rockwood Center*, 275 Mich App 244, 247; 737 NW2d 801 (2007). When assessing openness and obviousness, the focus is strictly on the premises themselves, not any particular plaintiff. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329; 683 NW2d 573 (2004).

It appears to us beyond any dispute that the slippery condition of the floor was not only obvious, but in fact clearly understood by plaintiff, as well. The record is less well-developed regarding the slope and the combination of the two hazards. The evidence indicates that most of the floor was flat, but it had an unannounced "pitch" in the floor at one end of the rectangular machine area, although running the entire width thereof. Plaintiff testified that there was nothing blocking him from observing it. However, the evidence also shows that the coolant was an opaque color and formed a pervasive mist or spray in the air to at least some extent. Whether or not a slope in a portion of an otherwise relatively level floor would have been open and obvious by itself is an issue for the trier of fact. When imbued with the coolant on the floor and the mist in the air the hazard of the existing condition was enhanced. Plaintiff was warned by defendant of the slippery conditions, but not of the slope.

When "the premises" are considered in their entirety, we are less convinced that there is no genuine question of material fact whether "an average user with ordinary intelligence would

have been able to discover the danger and risk presented upon casual inspection” under the conditions present. Although the slope *may* have been discoverable by an observer carefully looking for a hazard on the floor, we are less convinced that it would have been readily apparent to a casual observer, particularly given the other conditions present.

Our resolution of the other issue raised on appeal makes it unnecessary for us to determine whether the slope was, in fact, open and obvious. Even if a condition is open and obvious, the premises owner may still owe a duty of care to an invitee if “special aspects” of the condition render the hazard effectively unavoidable or unreasonably dangerous. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 593; 708 NW2d 749 (2005). “Special aspects” may not be merely theoretical or dependent on a plaintiff’s idiosyncrasies. *Id.* They also do not exist if the condition is either common or avoidable. *Richardson, supra* at 247. We find the hazardous condition of the floor in the instant case to have “special aspects” for two reasons.

First, the evidence shows that plaintiff could not have performed the maintenance that defendant required on defendant’s machine without traversing the hazards that existed in the plant. Thus, the condition was effectively unavoidable. Plaintiff would not have been able to perform his own job, at a risk to his own employment – which is hardly an idiosyncratic decision. Perhaps more importantly, defendant’s *own* needs could not have been met without requiring *someone* to brave the dangers it created. Even if plaintiff could realistically have refused to face the risk, *defendant* needed *someone* to do so in order to have the machine repaired. In other words, the sloped, coolant-covered floor could conceivably have been avoided by plaintiff had he chosen to face other severe risks, but defendant required someone to face that danger.

Second, the evidence reveals at least a genuine question of fact whether the slippery and sloped condition of the floor presented a uniquely high likelihood of severe harm. Plaintiff, who was apparently summoned to perform diagnosis on this machinery in part because of his expertise, needed to shuffle his feet, hold onto a piece of equipment, and use his other arm for balance *just on the flat part of the floor*. Again, the evidence is ambiguous whether the slope could easily be discerned, particularly where visibility was less than optimal. The critical fact in our view is that slippery floors and sloped floors are, independently, potentially dangerous conditions. Here, the evidence shows that simply traversing the flat portion of the floor was already a considerable challenge. Adding an unannounced slope to part of the floor is enough of an additional challenge to raise a genuine question of fact whether the total risk presented was unreasonable.

We therefore find a genuine issue of material fact regarding the existence of “special aspects” giving rise to potential premises liability for defendant irrespective of the openness and obviousness of the hazards presented by the slippery and sloped floor here. There is a genuine question of fact whether the slippery, sloped surface was effectively unavoidable or unreasonably hazardous. Summary disposition should therefore not have been granted.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Pat M. Donofrio
/s/ Alton T. Davis