# STATE OF MICHIGAN

# COURT OF APPEALS

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JACQUELINE MANESS,

Plaintiff-Appellee,

v

CARLETON PHARMACY, L.L.C., d/b/a SAV-MOR PHARMACY,

Defendant-Appellant,

and

KRYSTAL KLEEN CLEANING COMPANY and VICKIE ASHER,

Defendants.

UNPUBLISHED
May 31, 2007

No. 271581
Monroe Circuit Court
LC No. 05-020422-NO

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JACQUELINE MANESS,

Plaintiff-Appellee,

v

CARLETON PHARMACY, L.L.C., d/b/a SAV-MOR PHARMACY,

Defendant,

and

KRYSTAL KLEEN CLEANING COMPANY and VICKIE ASHER,

Defendants-Appellants.

No. 271976
Monroe Circuit Court
LC No. 05-020422-NO

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Before: Smolenski, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendants appeal by leave granted the trial court order's denying their motions for summary disposition regarding plaintiff's claim for injuries suffered following a slip and fall while on the premises of defendant Carleton Pharmacy, L.L.C. ("Carleton"), where defendant Vickie Asher ("Asher"), owner of Krystal Kleen Cleaning Company ("Krystal Kleen"), had recently mopped the floor. We reverse.

## I. Basic Facts and Procedure

Plaintiff worked as a dental assistant in an office that shared a parking lot with Carleton.[1] For three years, plaintiff went to Carleton on a daily basis for pop and gum. On June 13, 2005, plaintiff entered the store, walked down the center aisle to the back of the store, got a pop, and walked back down the same aisle. Plaintiff did not see any wet floor signs, buffing instruments, or a mop bucket, and did not notice whether the floors had been washed. When plaintiff came out of the aisle, she intended to go to the register on her right, but another customer was standing at the register.

Janet Culter, the cashier at the register on plaintiff's left (second register) indicated to plaintiff that she could ring up the purchase. Plaintiff testified that she had just pivoted to her right to walk toward the first register when the cashier on the left called out to her, so she never took any steps in the direction of the first register. Plaintiff never looked down at the floor. Plaintiff admitted that there was nothing between her and the wet floor sign in the open area in front of the registers that would have obstructed her view of the sign. She did not see the sign because she was looking toward the second register.

Plaintiff alleged that she began to pivot to her left to go to the second register and fell. Plaintiff caught herself with her left hand, and no other part of her body had contact with the ground. Plaintiff's hand was wet, but she could not tell by looking at the floor that the floor was wet. Plaintiff stood up, paid for the pop at the second register, and left the store. Culter told the cleaning lady, Asher, that she was "too late with the sign." Asher replied that there was already a sign out. Plaintiff did not find the floor slippery as she walked from the cash register to the door, but she walked very slowly and stayed closer to the registers, about two feet from her fall.

Plaintiff's back was sore, but she went back to work for the rest of the day. Plaintiff also went to work the next day, but she went to her physician two days after the fall. Plaintiff was diagnosed with a sprain in her back and a torn rotator cuff in her shoulder. Plaintiff went through physical therapy and later had surgery for a herniated disc.

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[1] Asher is the sole proprietor of Krystal Kleen and has had a contract with Carleton since 2001 for cleaning specified areas of the store twice a week and buffing the floor twice a month.

Culter testified that she saw plaintiff enter the store and walk by the front area with the registers before going to the back to get her pop. The wet floor sign was in place at that time, so plaintiff would have walked by it. Culter testified that plaintiff came to the front of the store from the aisle to the left of the second register and walked toward the registers. Culter said she could help plaintiff at her register, and plaintiff looked in her direction. Culter turned her head for a second, and when she looked back, plaintiff was getting up from the floor. Plaintiff had emerged from the aisle and was already in the front area of the store when she fell.

As a result of her fall, plaintiff filed a complaint against Carleton on August 24, 2005, alleging injuries resulting from Carleton's negligence in failing to inspect and maintain its floors in a condition free of unreasonable hazards to invitees, and to warn of or eliminate such hazards. Carleton answered the complaint, asserted several affirmative defenses, and responded with a notice identifying Asher and Krystal Kleen as potentially responsible non-parties, pursuant to MCR 2.112(K)(3), because they were cleaning and buffing the floors at the location of the accident.

Plaintiff filed an amended complaint adding Asher and Krystal Kleen as codefendants. All defendants answered the amended complaint and asserted affirmative defenses. Carleton filed a motion for summary disposition, pursuant to MCR 2.116(C)(10), alleging that a surveillance video shows that plaintiff slipped and fell directly in front of a wet floor sign, and the open and obvious doctrine mandated dismissal of this case. Krystal Kleen and Asher filed a concurrence in Carleton's motion for summary disposition.

Plaintiff responded that the open and obvious rule did not bar her claim because the wet floor sign was not in plaintiff's line of sight, the cashier distracted plaintiff before she could see the sign, the yellow background of the floor and wall made the yellow sign inconspicuous, and the entire area was wet and unavoidably slick. Plaintiff responded to Krystal Kleen and Asher's concurrence, contending that the open and obvious doctrine applies only to those in possession or control of the premises, so it would not apply to Krystal Kleen or Asher.

At the hearing on the motion, Carleton used the video to demonstrate that plaintiff's exhibits of photographs marked with the alleged location of the wet floor sign and her fall were inaccurate, nothing blocked plaintiff's view of the sign as she walked directly at it, plaintiff admitted she was not watching where she was walking, and the location of the sign in the immediate vicinity of her fall made the condition of the floor open and obvious as a matter of law. Carleton also attempted to refute plaintiff's allegation that there was an unavoidable hazard because the video showed other customers and an employee walk through the same area without difficulty, and after the fall, plaintiff paid for her merchandise, walked past where she fell without any problems, and left the store. Plaintiff admitted that she was more careful after the fall, which contradicted the unavoidable hazard argument.

Krystal Kleen and Asher concurred with Carleton that the sign was in plain sight had plaintiff looked, making the condition open and obvious. Therefore, Asher provided sufficient warning that she was working in the area. Plaintiff argued that the sign was placed well to the right of the second register, several feet from plaintiff's line of travel, and Asher admitted that when plaintiff emerged from the aisle, she would not be placed on notice that the floor was wet by a sign over to her right, so it was not open and obvious that the floor where she walked was going to be wet. In addition, plaintiff acted as a reasonable invitee by focusing her attention to

the left where the cashier said she could help her. Plaintiff also argued that the open and obvious doctrine does not apply to a contractor who makes a condition more dangerous by not placing a wet floor sign in an appropriate location.

The trial court questioned whether plaintiff stepped out of the aisle onto an area that was already wet, or if she was walking on dry floor toward the sign before she fell. The court concluded that it could not say unequivocally that plaintiff took a step or two in the direction of the sign before she fell, although it appeared that way from the video, thus creating a factual question regarding whether plaintiff had the opportunity for casual inspection of the sign. Defendants' motions were denied.

## II. Analysis

Carleton argues on appeal that the trial court should have granted its motion for summary disposition because the condition of the floor was open and obvious and not unreasonably dangerous. We agree.

### A. Standard of Review

A motion for summary disposition made under MCR 2.116(C)(10) is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A genuine issue of material fact exists when reasonable minds could differ upon an issue after viewing the record in the light most favorable to the nonmoving party. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). This Court must limit its review to the evidence presented up to the time the motion was decided. *Peña v Ingham County Road Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

### B. Premises Liability

"To establish a prima facie case of negligence, a plaintiff must prove: (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach caused the plaintiff's injuries, and (4) the plaintiff suffered damages." *Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 60; 680 NW2d 50 (2004), citing *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). A landowner's duty to a person who enters the land depends on the visitor's status. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). "An invitee is one who enters the land of another for a commercial purpose on an invitation that carries with it an implication that reasonable care has been used to prepare the premises and to make them safe." *O'Donnell v Garasic*, 259 Mich App 569, 573; 676 NW2d 213 (2003); see also *Stitt, supra*, pp 596-597.

> The landowner has a duty of care, not only to warn the invitee of any known dangers, but the additional obligation to also make the premises safe, which

> requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards. [*Stitt, supra*, pp 596-597 (citation omitted).]

C. Danger was Open and Obvious

In this case, plaintiff was an invitee of Carleton because she entered the premises for a commercial purpose. Therefore, Carleton had a duty to plaintiff to inspect the premises and either warn of or remedy any discovered hazards. *Stitt*, *supra*, pp 596-597. However, this obligation does not include the existence of open and obvious dangers. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). "[W]here the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Lugo*, *supra*, p 516, citing *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). The question is 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 (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

However, "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." *Lugo*, *supra*, p 517. This applies "where the condition poses such a high risk of serious injury or death that, even if open and obvious, the premises owner should eliminate the condition entirely." *Stopczynski v Woodcox*, 258 Mich App 226, 234; 671 NW2d 119 (2003).

Based on the evidence in the record, there is no indication that Carleton failed to inspect the premises for hazards to its invitees or failed to warn of or remove any discovered dangerous conditions. The surveillance video shows the exit door to the far right of the screen, the first register next to the door, an employee gate to the left of the first register, and then the second register to the left of the gate. There is a yellow wet floor sign in the area in front of the registers, closer to the first register. When plaintiff came out of the aisle, she intended to go to the first register, but the cashier at the second register, Janet Culter, indicated that she could ring up plaintiff's purchase. Plaintiff testified in her deposition that she had just pivoted to her right to walk toward the first register when Culter called out to her, so she never took any steps in the direction of the first register. Plaintiff began to pivot to her left to go to the second register and fell.

Further, it is clear that the wet floor was an open and obvious condition. Plaintiff admitted that there was nothing between her and the wet floor sign in the open area in front of the registers that would have obstructed her view of the sign. She did not see the sign because she was looking toward the second register. Similarly, the plaintiff in *Lugo* tripped over a pothole in a parking lot because she was distracted by a truck. *Lugo*, *supra*, pp 514-515. Our Supreme Court concluded that there was nothing unusual about vehicles being driven in a parking lot, so the plaintiff's distraction was not a factor that would negate the open and obvious doctrine. *Lugo*, *supra*, p 522. Likewise, there is nothing unusual about a cashier indicating that she can ring up a customer's purchase when that customer is walking toward a register that is already occupied.

Finally, there was no special aspect that would make the open and obvious condition unreasonably dangerous. This exception to the open and obvious doctrine applies where there is a "uniquely high likelihood of harm or severity of harm," and does not apply to typical open and obvious dangers. *Lugo, supra*, pp 519-520. A worker mopping the floor at a store is an "'everyday occurrence' that ordinarily should be observed by a reasonably prudent person." *Lugo, supra*, p 523. Therefore, the trial court erred in denying Carleton summary disposition because the condition of the floor was open and obvious and not unreasonably dangerous.

D. Negligence

Krystal Kleen and Asher argue that the trial court also erred in denying their motion for summary disposition because the condition of the floor was open and obvious. We disagree that the open and obvious doctrine applies to Krystal Kleen and Asher, but agree that the trial court should have granted summary disposition under a general negligence standard. As stated, to establish negligence, a plaintiff must prove duty, breach, causation, and damages. *Kosmalski, supra*, p 60. Plaintiff correctly asserts that the open and obvious doctrine applies to premises liability claims but not to ordinary negligence by a contractor who is not in possession of the premises. *Laier v Kitchen*, 266 Mich App 482, 489-490; 702 NW2d 199 (2005). In this context, Asher's conduct in the placement of the sign is at issue rather than the condition of the floor.

An independent contractor hired by the premises possessor has a "general duty to perform with due care so as not to injure another." *Courtright v Design Irrigation*, 210 Mich App 528, 530; 534 NW2d 181 (1995). This duty of care is owed to those foreseeably injured by the contractor's negligence, including the general public. *Osman v Summer Green Lawn Care Inc*, 209 Mich App 703, 708; 532 NW2d 186 (1995), overruled in part on other grounds *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456 n 2; 597 NW2d 28 (1999), superseded by statute as stated in *McLiechey v Bristol West Ins Co*, 408 F Supp 2d 516, 523-524 (WD Mich 2006).

We conclude that it was foreseeable that a customer could slip on a wet floor, so Asher owed plaintiff a general duty of care to warn of the danger while she was performing her contractual duties of cleaning the floor. *Osman, supra*, p 708. The video clearly shows a yellow wet-floor sign in the area in front of the registers, therefore Asher performed with due care so as not to cause an injury. As there was no genuine issue of material fact, the trial court erred in denying Krystal Kleen and Asher summary disposition.

The trial court's ruling denying defendants' motions for summary disposition is reversed, and this case is remanded to the trial court for entry of an order of summary disposition in defendants' favor. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra