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STATE OF MICHIGAN

COURT OF APPEALS

ALLEN LOPUS and TANYA LOPUS,

Plaintiffs-Appellants,

v

BAY CITY LODGING, LLC, doing business as QUALITY INN & SUITES,

Defendant-Appellee.

UNPUBLISHED
January 13, 2022

No. 356104
Bay Circuit Court
LC No. 19-003613-NO

Before: GLEICHER, C.J., and BORRELLO and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this slip-and-fall premises liability action, plaintiffs appeal as of right the order granting summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact) in favor of defendant. For the reasons set forth in this opinion, we reverse and remand.

I. BACKGROUND

On the evening of June 24, 2019, plaintiff[1] slipped and fell on the sidewalk outside the Quality Inn while running to avoid the rain. Plaintiff testified at his deposition that, after parking his car, he ran at "half speed" across the parking lot and onto the sidewalk toward the front entrance of the hotel. There was a steady rain, and it was still light outside. The parking lot was wet, but plaintiff did not recall any puddles and did not slip or slide in the parking lot. When he reached the sidewalk leading to the hotel entrance, the sidewalk was also wet. However, plaintiff did not remember any puddles on the sidewalk. Plaintiff testified that as he ran, he looked at the ground where he was running and also glanced up to see where he was going. As plaintiff approached the entrance, his left foot slid out from underneath him and he fell onto his left shoulder and left side of his back. Plaintiff described the fall more specifically during his deposition as follows:

[1] We use "plaintiff" to refer to Allen Lopus, and we use "plaintiffs" to refer to Allen and Tanya Lopus together.

> I reached out with my left foot, you know, I was just running, reached out with my left foot, felt immediately 1ike when my left foot touched down I sort of -- I lost control, and I didn't know -- I didn't know which way I was falling, I didn't know if I was falling backward or forward, just, you know, completely didn't have bearings . . . .

Plaintiff noticed after falling that the section of sidewalk on which he slipped was painted a different color and "[s]eem[ed] to be a different material" than the surrounding sidewalk sections. Plaintiff gave the following explanation:

> *Q*. What makes you think it's a different material?
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> *A*. Because when -- you know, after when I was looking at it, it was really slippery, you know, it's coated with something, it's not the -- not the concrete, what I assume is concrete on the other pads. You know, this -- this was, you know, some kind of a paint, I assume, on the -- on the pad that I slipped on.

Plaintiff testified that he did not slip at all on the unpainted portion of the sidewalk that he ran on before encountering the painted portion. The painted portion was whiter than the surrounding sidewalk. He also testified that the painted portion of the sidewalk was wet from the rain.

Plaintiff's wife, Tanya Lopus, testified in her deposition that she inspected the area where plaintiff fell and that the painted and unpainted portions of the sidewalk were clearly different colors. Tanya testified that she noticed a difference in texture between the painted and unpainted sidewalk surfaces, but only after she felt the surfaces with her foot. According to Tanya, the light-colored sidewalk slab on which plaintiff had fallen was "very slippery" and felt "like stepping onto ice" when the sidewalk was wet. In contrast, Tanya indicated that the unpainted portion of sidewalk felt still felt "normal."

Stephanie Maxwell, general manager of the Quality Inn, testified that the concrete slabs near the front entrance of the hotel were repainted "the week before" plaintiff arrived to stay at the hotel.

Todd Ford, chief maintenance engineer for the Quality Inn, testified that he repainted the sidewalk pursuant to instructions from the new management group because the new management wanted to change the color of the sidewalk, which had previously been painted a solid rose color. Ford was provided with the supplies for the project, which included "some stain, some sealer, some . . . decor flakes to go in it, and just my rollers, brushes, stuff to apply it with." Ford did not purchase these supplies, and he did not know what material was used to make the flakes. Maxwell testified that the hotel ownership group purchased these products from Sherwin-Williams. According to Maxwell, a member of the ownership group called Sherwin-Williams to explain the project and was told which products to use. Maxwell "assumed" that the flakes were intended to "create a slip resistance."

Ford testified that he painted the sidewalk with the stain, let the stain dry, then put a coat of sealer down with "decor flakes"[2] mixed in, and then applied another coat of sealer on top. According to Ford, the flakes only served a decorative purpose and did not change the texture of the painted surface. Ford testified that no one ever told him that the flakes provided an anti-slip surface.[3] He also stated that his training in the process of applying these substances to the sidewalk came from "the instructions on the can."

The sealer used by Ford included the following recommendation on its label:

> **Slip Resistance:**
>
> Some surfaces may require a slip/skid resistant additive for safety. Surfaces may be slippery when wet and proper preventative precautions are recommended. To increase slip/skid resistance, add H&C SHARKGRIP Slip Resistant Additive to the coating when applying. See product data page for detailed instructions. The addition of anti-slip/skid additives will not eliminate the possibility or risk of slipping/skidding or falling.

Ford testified that he heard about plaintiff's fall the next day he was at work and did not notice anything unusual about the area of the fall. Ford stated, "I walk in and out of that door thousands of times. If it was slippery, I would have noticed it." Maxwell testified that she had walked across the portion of sidewalk in question when it was wet without slipping and that the painted portion of sidewalk was not more slippery when wet than the unpainted portions of sidewalk. She also testified that there was no visual indication from the painted surface when it was wet that the surface would be slippery.

Both parties retained experts to provide their opinion on the circumstances of the fall. Plaintiffs retained Lee E. Martin, an architect who performs forensic evaluations on issues involving building safety and pedestrian walkways. In his affidavit, Martin stated that he visited the Quality Inn to inspect the sidewalk at issue. Martin opined that defendant created a hazardous condition when Ford painted and sealed the sidewalk because painting and sealing over existing layers of paint made the surface less slip-resistant than the unpainted sidewalk. He also asserted that the failure to use an abrasive additive in the sealer coat made the sidewalk less slip-resistant when it was wet. Martin further opined that the fact that the painted section of sidewalk was more slippery than the unpainted portion would not be noticeable upon casual inspection to an ordinary user of the sidewalk.

Defendant retained James M. Miller, who was the owner and operator of an engineering firm and specialized in areas that included safety engineering and analyzing the slip resistance of walking surfaces with various types of surface coatings. Miller stated that his firm conducted a site inspection at the Quality Inn that included testing to determine the coefficient of friction, which is a measure of slip resistance, of the coated and uncoated sections of sidewalk. He explained that

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[2] The receipt for the products used on the sidewalk labeled the flakes as "deco flakes."

[3] On the other hand, defendant asserted in response to an interrogatory that there were "flakes used within the paint to further enhance the slip resistant nature of the paint."

industry standards recommend a minimum coefficient of friction of 0.5 for walking surfaces to minimize slipping hazards. Miller stated that the coated sidewalk at issue measured at 0.65 or greater for each test and that the coated surface had a higher coefficient of friction than the uncoated sidewalk surface.

Plaintiffs initiated this action in a complaint alleging a claim for premises liability on the basis that the painted portion of sidewalk on which plaintiff fell was unexpectedly and significantly more slippery than the unpainted portions of the sidewalk because the painted portion had been painted with an epoxy paint without including an abrasive, anti-slip additive. Defendant subsequently filed a motion for summary disposition arguing that the sidewalk was not a dangerous condition and that even if it was, the painted and wet condition of the sidewalk was an open and obvious hazard. Defendant argued that the wet, painted condition of the sidewalk was readily observable. The trial court agreed that the hazard was open and obvious and granted defendant's motion for summary disposition. Plaintiffs now appeal.

II. ANALYSIS

Plaintiffs argue that the trial court erred by concluding that the condition of the sidewalk was an open and obvious hazard and granting summary disposition in favor of defendant.

We review de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Under MCR 2.116(C)(10), summary disposition is appropriate when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." The evidence must be viewed in the light most favorable to the party opposing the motion. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "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." *Id*.

A premises liability claim requires the plaintiff to "prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Mouzon v Achievable Visions*, 308 Mich App 415, 418; 864 NW2d 606 (2014) (quotation marks and citation omitted). A possessor of land generally "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); see also *Estate of Livings v Sage's Investment Group, LLC*, ___ Mich ___, ___; ___ NW2d ___ (2021) (Docket No. 159692); slip op at 6.[4] However, that duty generally does not extend to open and obvious dangers unless "special aspects of a condition make even an open and obvious risk unreasonably dangerous." *Lugo*, 464 Mich at 516-517; see also *Estate of Livings*, ___ Mich at ___; slip op at 6-

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[4] The parties do not dispute that plaintiff, who was staying at defendant's hotel, was defendant's invitee. "[I]nvitee status is commonly afforded to persons entering upon the property of another for business purposes." *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000).

7. Our Supreme Court has explained that there are "two instances in which the special aspects of an open and obvious hazard could give rise to liability: when the danger is *unreasonably dangerous* or when the danger is *effectively unavoidable*." *Hoffner v Lanctoe*, 492 Mich 450, 463; 821 NW2d 88 (2012); see also *Estate of Livings*, ___ Mich at ___; slip op at 7.

To determine whether a condition is open and obvious, the court conducts an objective inquiry, asking whether "an average user with ordinary intelligence [would] have been able to discover the danger and risk presented upon casual inspection." *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993); see also *Hoffner*, 492 Mich at 461 ("Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection. This is an *objective standard*, calling for an examination of the objective nature of the condition of the premises at issue.") (quotation marks and citations omitted). When the dangerous condition "that may cause injury is wholly revealed by casual observation," the landowner owes no duty to warn invitees of its presence. *Novotney*, 198 Mich App at 474. Therefore, to overcome a motion for summary disposition, the plaintiff must present "sufficient evidence to create a genuine issue of material fact that an ordinary user upon casual inspection could not have discovered the existence of the [hazardous condition]." *Id*. at 475.

In this case, plaintiffs argue that the painted section of sidewalk on which plaintiff slipped was a dangerous condition on defendant's property that was not open and obvious because it was significantly more slippery than the surrounding unpainted section of sidewalk that plaintiff had already traversed. To support this argument, plaintiffs contend that it was not apparent on casual inspection to an average person of ordinary intelligence that the painted sidewalk would be more slippery when wet than the unpainted sidewalk that was also wet.

With respect to the proof of slipperiness, plaintiffs presented evidence that the painted section of sidewalk had been recently painted and sealed without the use of the slip-resistant additive recommended by the manufacturer in the instructions printed on the can of the sealer. Additionally, plaintiff testified that after falling, he noticed that the painted sidewalk was coated with a "different material" and felt "really slippery." Tanya testified that the painted portion of sidewalk felt like "stepping onto ice" when it was wet, while the unpainted surface still felt normal. Finally, plaintiffs' expert stated that painting and sealing the sidewalk over existing layers of paint made that portion less slip-resistant than the unpainted portion. The expert also opined that the failure to use an anti-slip additive contributed to the slippery and hazardous nature of the painted portion of sidewalk when the sidewalk was wet.

Moreover, plaintiffs offered substantial evidence that the slippery texture of the sidewalk was not discoverable on casual observation by an ordinary person. Plaintiffs' expert stated that the significantly more slippery nature of the sidewalk would not have been readily observable by casual inspection. Tanya testified that the more slippery nature of the painted portion of the sidewalk, and the difference in texture between the painted and unpainted portions of sidewalk, were only noticeable after feeling the painted section of sidewalk with her foot. Although a difference in color between the painted and unpainted sections was noticeable, there was no evidence that the color difference existed to reflect a difference in the slipperiness of the various surfaces. Notably, there was evidence that the painted portion of sidewalk had been repainted a

shade of white for aesthetic reasons; it was not painted bright yellow or orange in a style typically associated with warning of potentially hazardous conditions.

The need to conduct a preliminary test by feeling a surface before fully placing weight on the surface to continue traversing it—where there is no warning or indication that such caution is warranted—far exceeds a "casual inspection" that it is reasonable to expect an average person of ordinary intelligence to conduct. *Hoffner*, 492 Mich at 461. "The entire premise of the open and obvious danger doctrine requires that the hazard would be *obvious* upon *casual* inspection." *Watts v Mich Multi-King, Inc*, 291 Mich App 98, 105; 804 NW2d 569 (2010) (quotation marks and citation omitted). A mere ordinary aesthetic difference in color between two surfaces, without more, does not make a slippery condition—which is the hazard at issue—open and obvious. *Id*. The focus of our analysis is the dangerous condition at issue, which is the greater degree of slipperiness on the painted sidewalk surface as compared to the surrounding unpainted sidewalk surface when both surfaces are wet; the change in color, although obvious, is not the dangerous condition presented. *Hoffner*, 492 Mich at 461; see also *Estate of Livings*, ___ Mich at ___; slip op at 6 ("[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 . . . . When the evidence creates a question of fact regarding this issue, the issue is for the fact-finder to decide.") (quotation marks and citation omitted; ellipsis in original).

Viewing all of the evidence in the light most favorable to plaintiffs, plaintiffs have presented sufficient evidence to create a genuine issue of material fact regarding whether the hazard presented by the significantly more slippery painted portion of sidewalk, as compared to the surrounding unpainted sidewalk when both surfaces were wet from the rain, was *obvious* upon *casual* inspection. Accordingly, the trial court erred by granting summary disposition for defendant on the basis that the slippery condition constituting the hazard was open and obvious.[5] We reverse the trial court's order granting summary disposition in favor of defendant and remand for further proceedings consistent with this opinion.[6]

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[5] We additionally note that there was evidence creating a genuine issue of material fact that this dangerous condition was caused by defendant's active negligence in repainting the sidewalk surface without the manufacturer recommended anti-slip additive. A premises liability claim requires the plaintiff to establish that the defendant premises possessor had "actual or constructive notice of the dangerous condition," and this notice standard may be satisfied by evidence that the "injury result[ed] from an unsafe condition caused by the active negligence of [the premises possessor] and his employees." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 10; 890 NW2d 344 (2016) (quotation marks and citation omitted).

[6] Based on our resolution of this matter, we need not address plaintiffs' additional arguments regarding whether there were "special aspects" of the condition and the continuing wisdom of Michigan's open-and-obvious-doctrine jurisprudence. Additionally, to the extent defendant seems to argue that plaintiff could have discovered the condition if he had been walking instead of running, this argument is without merit because "it is important for courts in deciding summary disposition motions by premises possessors in 'open and obvious' cases to focus on the objective

Reversed and remanded. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Stephen L. Borrello
/s/ Amy Ronayne Krause

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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.