POKAGON BAND OF POTAWATOMI INDIANS
TRIBAL COURT

58620 Sink Road, P.O. Box 355, Dowagiac, MI 49047

JEANETTE BORZYCH,
Plaintiff

-vs-

FOUR WINDS CASINO RESORT, LAKES ENTERTAINMENT, INC., As managers for the Pokagon Band of Potawatomi Indians, POKAGON BAND OF POTAWATOMI INDIANS, GAMING ENTERPRISE and/or POKAGON GAMING AUTHORITY, A charter Instrumentality of the Pokagon Band of Potawatomi Indians,
Defendants

Case No. 11-1328-CV

Honorable David M. Peterson

Law Office Martin Ulferts & Associates
By: Martin R. Ulferts (P 19605-46)
Attorney for Plaintiffs
910 Washington Street
Michigan City, Indiana 46360
Phone: (219) 872-2492
Fax: (219) 872-2571

Tobin H. Dust (P36741)
Humphreys, Campbell, Dust & Humphreys
Attorneys for Defendants
5090 State Street, Bldg. A, Suite One
Saginaw, Michigan 48603
Phone: (989) 792-2552
Fax: (989) 792-3881
E-Mail: tdust@hcdh-law.com

OPINION AND ORDER

INTRODUCTION

This case is before the Court on a Motion for Summary Disposition filed by the Defendant, the Pokagon Gaming Authority[1] which is an unincorporated governmental instrumentality of the Pokagon Band of Potawatomi Indians, a sovereign, federally recognized Indian Tribe. The Defendant brings its Motion pursuant to MCR 2.116(C)(10),

[1]It was agreed by both Plaintiff and Defendant at a pretrial conference that the only Defendant would be Pokagon Gaming Authority and all other Defendants were dismissed.

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claiming there is no genuine issue of material fact in that the condition of which the Plaintiff complains was open and obvious.

The Court finds that there existed an open and obvious condition of Defendant's premises and the Motion for Summary Disposition should be granted for the following reasons.

FACTS

The following facts are generally apparent from the affidavits filed or uncontested pleadings. On December 11, 2010, Plaintiff was a patron at the Defendant's Four Winds Casino Resort and was an invitee. Defendant, Pokagon Gaming Authority is the operator of Four Winds Casino Resort.

Plaintiff slipped and fell in a restroom which she had used on numerous prior occasions. Plaintiff had bags or boxes in both hands and doesn't recall where she was looking when she entered the restroom.

The Plaintiff said she saw a large amount of water on the floor and described the puddle of water as in front of or underneath the sink and ran out towards the door.

Defendant's employees' affidavits attest that the restroom had been checked 20-30 minutes before the incident and found no problems that could have contributed to the accumulation of water. Further, that the water was readily observable from outside and at the restroom entryway.

STANDARD OF REVIEW

A court may grant a Motion for Summary Disposition pursuant to MCR 2.116(C)(10) when there is no genuine issue to any material fact and the moving party is entitled to judgment as a matter of law. The court considers affidavits, pleadings, depositions,

admissions, and documentary evidence submitted by the parties in the light most favorable to the party opposing the motion. *Maiden v Rozwood, 461 Mich 109, 120 (1999); Quinto v Cross & Peters, 451 Mich 358, 362 (1996); Stevenson v Reese, 239 Mich App 513, 516 (2000).* Where the proffered evidence does not establish a genuine issue as to any material fact, the moving party is entitled to judgment as a matter of law. *Maiden, supra.*

When a party makes a motion pursuant to MCR 2.116(C)(10) that is properly supported as provided in MCR 2.116(G)(4), the adverse party may not rest upon the mere allegations or denials in its pleadings. Rather, the adverse party must go beyond the pleadings and set forth, by affidavits or as otherwise provided in MCR 2.116(G)(4), specific facts to show that there is a genuine issue for trial. If the adverse party fails to so respond, judgment, if appropriate, shall be entered against that party. MCR 2.166(G)(4); *Maiden, supra*, at 120-21.

ANALYSIS

Since the current Tribal Court rules do not address motions for summary disposition nor substantive law, according to the Tribal Court Code (10-21-2002), the Tribal Court must look to the rules of practice and substantive law of Michigan (see Sections 7 and 8 of the Pokagon Band of Potawatomi Indians Tribal Court Code and Section 11 of the Tort Claims Ordinance).

A. OPEN AND OBVIOUS DANGER DOCTRINE

Defendants argue that Plaintiff's claim should be barred by application of the open and obvious danger doctrine. Plaintiff was an invitee: one who is invited onto the land for a commercial purpose. See *Stitt v Holland Abundant Life Fellowship, 462 Mich 591, 597;*

614 NW 2d 88 (2000). "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." *Id.*

Plaintiff also argues that Defendant has a duty to not only warn but inspect the premises and make repairs or warn of hazards. Plaintiff claims the surrounding condition and character and location are special aspects that are exceptions to the open and obvious doctrine.

The above duty does not generally encompass removal of open and obvious dangers "where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discovery them." *Riddle v McLouth Steel Prod Corp, 440 Mich 85, 96; 485 NW 2d 676 (1992).* 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. *Joyce v Rubin, 249 Mich App 231, 238; 642 NW2d 360 (2002).* In this case, it is not disputed that the water at the entrance and in front of the sinks in the restroom existed and was an open and obvious danger.

Plaintiff asserts a material issue of fact exists regarding when the bathroom was last checked and the Defendant knew or should have known that water had accumulated on the floor.

Whether or not the Defendant had notice of the water on the floor is a question of fact, Plaintiff argues, and should be left to the trier of fact. Plaintiff argues she never had notice of the water, so she couldn't have put the Defendant on notice.

However, the test is objective: "The inquiry is whether a reasonable person in the Plaintiff's position" would have discovered the danger upon casual inspection. *Slaughter v Blarney Castle Oil Co, 281 Mich App 474, 479; 760 NW 2d 287 (2008).* When deciding a summary disposition motion based on the open and obvious danger doctrine, "it is important for courts...to focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff." *Lugo v Ameritech Corp, Inc., 464 Mich 512, 523-524; 629 NW 2d 384 (2001).* If genuine issues of material fact exist regarding the condition of the premises and whether the hazard was open and obvious, summary disposition is inappropriate. See *Bragan v Symanzik, 263 Mich App 324; 687 NW 2d 881 (2004).*

If special aspects of a condition make even an open and obvious risk unreasonably dangerous, the land possessor has a duty to undertake reasonable precautions to protect invitees from that risk. Lugo, *supra.* A special aspect exists when the danger, although open and obvious, is effectively unavoidable or imposes a uniquely high likelihood of harm or severity of harm. *Id.* at 518-519. In considering what constitutes a special aspect, a court must evaluate the objective nature of the condition of the premises, not the subjective degree of care used by the plaintiff or other idiosyncratic factors related to the particular plaintiff. *Bragan v Symanzik, 263 Mich App324, 332; 687 NW 2d 881 (2004)*, citing *Lugo, 464 Mich* at 523-524.

In general, a premises possessor must exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition on the land. *Bertrand v Alan Ford, Inc., 449 Mich 606, 609; 537 NW 2d 185 (1994).* However, this duty does not

generally require the removal of open and obvious dangers. In *Lugo, supra*, at 516-517, we rearticulated the open and obvious doctrine:

> [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 [Page 522] the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee.
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> * * *
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> In sum, the 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. [Internal citations omitted; emphasis added.]

We also stated that the open and obvious doctrine should not be viewed as "some type of 'exception' to the duty generally owed invitees," but rather viewed "as an integral part of the definition of that duty." *Id.* at 516.

B. TORT CLAIMS ORDINANCE - WAIVER OF IMMUNITY

As with all matters where the Pokagon Band of Potawatomi Indians or its agencies are being sued, the issue of sovereign immunity must be addressed.

As applied to this case, the Pokagon Band of Potawatomi Indians have adopted a Tort Claims Ordinance where it has waived sovereign immunity of the gaming enterprise (operated by the Pokagon Gaming Authority) for damages resulting from "injury proximately caused by the condition of any property of the gaming enterprise at the gaming enterprise site, provided the claimant establishes that the property was in a dangerous condition" (see Section 4C2 of the Tribal Court Claims Ordinance and all referenced terms and sections).

<u>APPLICATION OF LAW</u>

In this case, it is essentially agreed that the floor had water on it which caused the Plaintiff's fall.

The Defendant has offered affidavits where the testimony indicates that the floor was wet at the time of the Plaintiff's fall and that a reasonable person would have observed that condition on casual observation.

The testimony of the Defendant's employees by affidavit is that upon inspection of the restroom water could be seen on the floor. Thus, the water on the restroom floor was visible upon casual inspection.

Based upon all of the information before the Court and application of the applicable law, it appears that the Plaintiff could have avoided the wet restroom floor had she casually observed her path of entry.

In this case, viewing the evidence in the light most favorable to the Plaintiff, an average user with ordinary intelligence would have been able to discover the danger and risk presented by the wet restroom floor upon casual inspection.

It is the duty of the Defendant to exercise reasonable care to protect the Plaintiff from an unreasonable risk of harm caused by a dangerous condition on the premises. However, the Defendant owes no duty to protect the Plaintiff from dangers that are "open and obvious" unless special aspects exist such that is a condition that is effectively unavoidable or imposes an unreasonably high risk of severe harm. The Court finds no special aspects existed in this case.

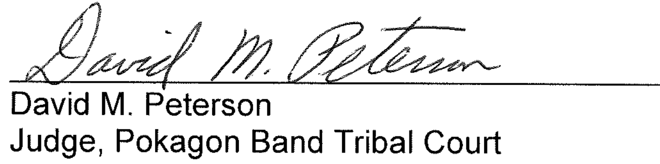
CONCLUSION

For the reasons stated above and the application of the open and obvious doctrine, the Court finds there are no genuine issues as to any material fact and the Defendant is entitled to judgment as a matter of law. Accordingly, the Court need not address the issue of sovereign immunity or its waiver as set out in Section 4 of the Tort Claims Ordinance.

ORDER

For the reasons stated above, the Plaintiff's claim against the Defendant is dismissed.

Dated: February 15, 2012



David M. Peterson
Judge, Pokagon Band Tribal Court