S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

DIANE HUHTA,

Plaintiff-Appellant,

v

BED BATH & BEYOND,

Defendant-Appellee.

UNPUBLISHED
February 26, 2004

No. 243061
Macomb Circuit Court
LC No. 2001-004908-NO

Before: Fort Hood, P.J., and Bandstra and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition for defendant. We affirm.

Plaintiff filed a premises liability action against defendant arising from plaintiff's trip and fall accident at defendant's store when she tripped and fell over a foot massager just after placing her grandson in a vibrating chair nearby. The trial court granted defendant's MCR 2.116(C)(10) summary disposition motion finding the foot massager to be an open and obvious condition.

Plaintiff claims that the trial court erred in finding the foot massager to be an open and obvious condition. In the alternative, plaintiff asserts that even if it was an open and obvious condition, it should be considered unreasonably dangerous because the accident happened in a self-service store, in which the proprietor purposefully distracts patrons with its various displays. We disagree.

This Court reviews a trial court's grant of summary disposition de novo. *General Motors Corp v Dep't of Treasury*, 466 Mich 231, 236; 644 NW2d 734 (2002). A premises owner is required to maintain its property in a reasonably safe condition and has a duty to exercise due care to protect invitees from conditions that might result in injury. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 90; 485 NW2d 676, (1992). Yet, a premises owner has no duty to protect invitees from open and obvious dangers unless special aspects of that condition pose an unreasonable risk of harm. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001). A danger is open and obvious when it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection. *Hughes v PMG Building, Inc*, 227 Mich App 1, 10; 574 NW2d 691 (1997).

As the trial court noted, plaintiff, in her deposition, acknowledged that the foot massager, which was metallic in color in contrast to the wood floor of defendant's store, "definitely" stood out from the floor, and that she would have seen it if she looked down. Plaintiff stated that she did not look down because she did not want to run into all of the people around her. She also testified that she had just sat her grandson down in one of the vibrating chairs near the foot massager, and turned to respond to her daughter who had called her regarding some curtains when she tripped and fell, fracturing her hip.

Plaintiff argues that, because the accident occurred in a self-service store, the open and obvious doctrine should not apply. Plaintiff relies on language from *Jaworski v Great Scott Supermarket's, Inc*, 403 Mich 689, 699-700; 272 NW2d 518 (1978):

> The displays of merchandise in modern stores are so arranged and are intended to catch the customer's attention and divert him from watching the floor. * * * The public does not expect to shop at its own risk and it is unreasonable to expect a person in a retail store to use the same degree of lookout as he would on a public street.
>
> * * *
>
> Defendant's store in this case was a 'self-service' type store, in which its merchandise was displayed on counters or on shelves so that customers could inspect the merchandise as they walked in the aisles or passageways of the store. The storekeeper certainly intended that his customers would devote the major part of their attention to the merchandise which was being displayed, rather than to the floor to discover possible obstructions in the aisle, and in our opinion that circumstance must be considered in determining the degree of care which a storekeeper should use in maintaining safe passageways. A patron in a self-service type store, we think, is entitled to rely upon the presumption that the proprietor will see that the passageways provided for his use are reasonably safe, considering the fact that while using these passageways he may be devoting some of his attention toward inspecting the merchandise. [(Internal quotations and citations omitted).]

However, regarding the spilled cottage cheese upon which Jaworski slipped the Court concluded:

> Further, the evidence as to the color of the floor supports the conclusion that the spilled cottage cheese was *relatively inconspicuous*. [*Id*. at 698 (Emphasis added).]

Unlike the cottage cheese in *Jaworski*, the foot massager here "definitely" stood out, and was, thus, open and obvious. Further, we find no reason to apply the "distraction" theory from *Jaworski*, a contributory negligence case, to open and obvious cases. The *Jaworski* reasoning applied where a duty had been found to exist. Here because the foot massager was open and obvious, no duty exists under the later precedents cited above.

As noted above, 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* at 517. Plaintiff alternatively argues that the fact that this accident occurred in a self-service store should be considered such a "special aspect" to negate the open and obvious doctrine. We disagree.

In *Lugo*, *supra*, our Supreme Court discussed the conditions that qualified as "special aspects." The Court reasoned by way of illustration as follows:

> An illustration of such a situation might involve, for example, a commercial building with only one exit for the general public where the floor is covered with standing water. While the condition is open and obvious, a customer wishing to exit the store must leave the store through the water. In other words, the open and obvious condition is effectively unavoidable. Similarly, an open and obvious condition might be unreasonably dangerous because of special aspects that impose an unreasonably high risk of severe harm. To use another example, consider an unguarded thirty foot deep pit in the middle of a parking lot. The condition might well be open and obvious, and one would likely be capable of avoiding the danger. Nevertheless, this situation would present a substantial risk of death or severe injury to one who fell in the pit that it would be unreasonably dangerous to maintain the condition, at least absent reasonable warnings or other remedial measured being taken. In sum, only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine. [*Lugo*, *supra* at 518-519 (Emphasis added).]

Thus, in order to qualify as a special aspect the self-service store or the foot massager, or both together, must create either a "uniquely high likelihood of harm," or a "uniquely high likelihood of severe harm if the risk is not avoided." These dangers must be reviewed *a priori*, that is prior to the accident, and not based upon the unusual results of a particular accident. *Id*. at 519 n 2.

Here, it is clear that the foot massager was not *unavoidable* like a pool of water in front of the only exit to a store. There was no necessity for plaintiff to go near the foot massager; she could have avoided it by merely looking down at her path of travel. Further, the foot massager did not pose a threat of *severe* harm as did the thirty-foot-deep hole in the Court's illustration. That this accident happened in a self-service store does not change these facts or otherwise negate the application of the open and obvious doctrine to this case.

We affirm.

/s/ Karen M. Fort Hood
/s/ Richard A. Bandstra
/s/ Patrick M. Meter