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

ROSA BIZYK,

Plaintiff-Appellant,

v

JOE RANDAZZO'S FRUIT & VEGETABLE, INC.,

Defendant-Appellee.

UNPUBLISHED
February 17, 2005

No. 250570
Wayne Circuit Court
LC No. 02-234310-NO

Before: Kelly, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals the trial court's order that granted summary disposition in favor of pursuant to MCR 2.116(C)(10), and we affirm.

Plaintiff asserts that because there is a genuine issue of material fact summary disposition should not have been granted. Plaintiff says that the question of whether the stack of boxes was open and obvious, and further even if open and obvious, whether the stack of boxes was "unreasonably dangerous," should have been decided by the jury, not the judge. We review de novo claims that the trial court improperly granted summary disposition. *Dressel v Ameribank,* 468 Mich 557, 561; 664 NW2d 151 (2003).[1]

[1] When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition is proper under MCR 2.116(C)(10), if the documentary evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *J & J Farmer Leasing, Inc v Citizens Insurance Co of America*, 260 Mich App 607, 612; 680 NW2d 423 (2004). 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 could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003).

To establish a negligence case, plaintiff must establish that: (1) a duty defendant owed plaintiff, (2) defendant breached that duty, (3) plaintiff suffered an injury, and (4) defendant's breach of duty caused plaintiff's injury. *Phillips v Diehm*, 213 Mich App 389, 397; 541 NW2d 566 (1995). Generally, a landowner has a legal duty to business invitees to exercise reasonable care to protect them from an unreasonable risk of harm caused by a dangerous condition of the land which the landowner knows or should know the invitees will not discover, realize or protect themselves against. *Bertrand v Alan Ford, Inc,* 449 Mich 606*,* 609; 537 NW2d 185 (1995). However, under the open and obvious doctrine, a landowner has no duty to protect invitees from injuries on their land when the danger is known or obvious to the invitees, unless the landowner should anticipate the harm despite such knowledge or obviousness. *Id*. at 610. If the invitee should have discovered the condition and realized its danger, then it falls under the open and obvious doctrine. *Id*. at 611.

Here, plaintiff testified that she saw the boxes, and, she testified that the boxes were "neatly stacked in front of the flower counter," and that she intentionally stepped up on to the cardboard so she could get the flower she wanted. Determination of whether a danger is open and obvious depends on whether "an average user with ordinary intelligence [would] have been able to discover" the risk presented upon a casual inspection. *Corey v Davenport College of Business*, 251 Mich App 1, 5; 649 NW2d 392 (2002). Plaintiff should have realized this danger.

If special circumstances exist such that an open and obvious hazard presents an unreasonable risk of harm, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the inviter is required to undertake reasonable precautions. *Bertrand, supra* at 611. "The critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly 'special aspects' of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm." *Lugo v Ameritech Corp*, 464 Mich 512; 517; 629 NW2d 384 (2001). The *Lugo* Court set forth two situations that might be "unreasonable," so as to take a defect out of the open and obvious doctrine. The first situation is if the open and obvious condition is "unavoidable." To illustrate this, the Court uses an example of a building with one exit, which is surrounded by water, and in order for someone to exit the building they would have to encounter the water, and thus, the defect is "unavoidable." The second situation is if the condition imposes an "unreasonably high risk of severe harm." To illustrate this, the Court uses an example of a thirty-foot open pit that is sitting in the middle of a parking lot and is unguarded. Even though the pit would be "open and obvious," and avoidable, it presents such a "substantial risk of death or severe injury" that it would be "unreasonably dangerous" to maintain the pit without some kind of warning put in place. *Id*. at 518. The Court goes on to state that, when determining whether a condition presents a "substantial risk of death or severe injury," the condition should be looked at before the incident takes place, and that just because a plaintiff may in fact have died or suffered a severe injury does not mean that "such harm was reasonably foreseeable." The substantial risk of death or severe injury must be foreseeable in order for it to take the open and obvious condition out of the scope of the open and obvious doctrine. *Id*. at 519.

Here, there is no evidence of special aspects that make the open and obvious stack of boxes unreasonably dangerous. Plaintiff could easily have avoided the stack of boxes. This situation is clearly not analogous to the examples described in *Lugo*. Here, the boxes were not

blocking an exit, and plaintiff did not have to scale the boxes to get out of the store. Plaintiff could have simply not bought the flowers, or, at the very least, she could have asked a store employee to get them for her. In fact, plaintiff said that the flowers on the bottom shelf were the same kind of flowers that she was reaching for on the top shelf, so she could have just taken some flowers from the lower shelf.

The stack of boxes also does not present an unreasonably high risk of severe harm. It is not foreseeable that a stack of boxes that is ten inches high, and partially in front of a flower display, would cause a substantial risk of death or severe injury. The *Lugo* Court uses a thirty-foot hole as an example of what would present an unreasonably high risk of severe harm. Clearly a stack of boxes does not present evidence remotely resembling the risk of a thirty-foot-deep pit.

Because of the foregoing, we hold that the trial court properly granted summary disposition in favor of defendant.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Henry William Saad
/s/ Michael R. Smolenski