STATE OF MICHIGAN

COURT OF APPEALS

RANDY JOSEPHSON,

Plaintiff-Appellant,

and

BLUE CROSS AND BLUE SHIELD OF MICHIGAN,

Intervening Plaintiff,

v

LOWES HOME CENTERS, INC.,

Defendant-Appellee.

UNPUBLISHED
May 11, 2001

No. 219088
Jackson Circuit Court
LC No. 98-086953-NO

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

PER CURIAM.

In this premises liability action, plaintiff appeals as of right from an order granting summary disposition in favor of defendant. We affirm.

Plaintiff filed the instant action in February 1998, seeking damages for a knee injury he sustained on May 16, 1997, while he was attempting to remove a roll of roofing displayed on a pallet at floor level in one of defendant's retail businesses. As amended, plaintiff's complaint alleged that defendant breached its duty of care in the following ways:

> A. Defendant failed to provide assistance to remove the roofing from the back of the pallet;
>
> B. Defendant failed to provide a safe pallet with a solid floor so that a person removing rolled roofing would not be in danger of slipping off the boards into the open space between such boards;
>
> C. Defendant failed to provide a warning sign to point out the danger of kneeling on said pallet.

Defendant filed a motion for summary disposition, arguing that it owed no duty to warn or protect plaintiff because the condition of the pallet was open and obvious and actually known to plaintiff, and plaintiff could easily have avoided the harm. In support of its motion, defendant submitted deposition testimony from plaintiff who admitted that the situation was open and obvious, but he thought he could remove the rolled roofing by himself. Plaintiff explained that his injury occurred during his second trip to the store to purchase rolled roofing that day. On his first trip to the store, plaintiff successfully loaded two rolls of roofing onto a cart and left the store after paying. Plaintiff returned to the store later that day to purchase more roofing material. Plaintiff knelt down on the pallet and removed one roll of roofing which he placed in his cart. When plaintiff turned to remove a second roll of roofing, the vertically stacked rolls of roofing began falling toward plaintiff. Plaintiff slid his right knee into a space between the slats to stop the roofing from falling, resulting in injuries to his knee. Plaintiff admitted that he did not ask anyone working in the store for assistance.

Defendant also submitted deposition testimony from plaintiff's wife who indicated that she was with plaintiff at the time he was injured and plaintiff just wanted to get "in and out" of the store. Finally, defendant submitted an affidavit from defendant's store manager, Douglas Wokurka, who asserted that the store had a buzzer system for customers to use if they needed assistance and did not see an employee in the immediate area as well as service counters for customers to seek assistance. Wokurka also averred that the two types of rolled roofing sold by defendant weighed about twenty-nine and forty-eight pounds per roll.

In opposition to defendant's motion for summary disposition, plaintiff submitted a photograph of the site where he was injured, taken a year and a half later, and an affidavit in which he stated that there were no signs indicating that help was available to load or unload materials purchased at the store. Plaintiff argued that the open and obvious doctrine did not shield defendant from liability because the risk of danger remained unreasonable given the absence of signs indicating assistance was available and the fact that defendant's business was operated as a self-help operation.

At the conclusion of the hearing, the trial court found that there was nothing unreasonably unsafe about the manner in which the rolls of roofing were stacked on the pallets. The trial court also found that any risk of harm caused by the rolls of roofing was open and obvious to plaintiff and not unreasonably harmful. Finally, the trial court found that defendant did not owe plaintiff a duty to warn of the open and obvious danger because there was "no reason to believe that the possessor would think that the invitee Plaintiff would not have known of these problems and acted for his own safety, which would have included attempting to secure help if he felt that it was such a dangerous condition." Accordingly, summary disposition was granted to defendant.

We review the trial court's grant of summary disposition de novo. *Graham v Ford*, 237 Mich App 670, 672; 604 NW2d 713 (1999). Although the trial court did not specify the specific subrule under which it granted summary disposition, because it considered materials outside the pleadings, we treat the motion as having been granted under MCR 2.116(C)(10). *Atkinson v Detroit*, 222 Mich App 7, 9; 564 NW2d 473 (1997). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Graham, supra* at 672. A court must consider the pleadings, affidavits, depositions, admission, and other documentary evidence available to it in a light most

favorable to the nonmoving party to determine whether a genuine issue of material fact exists. *Weakley v City of Dearborn Heights*, 240 Mich App 382, 385; 612 NW2d 428 (2000).

Possessors of land have a legal duty to exercise reasonable care to protect their invitees[1] from dangerous conditions on the land that the invitor 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); *Abke v Vandenberg*, 239 Mich App 359, 361; 608 NW2d 73 (1999). However, the duty of care owed to an invitee does not extend to conditions from which an unreasonable risk cannot be anticipated or to dangers so obvious that an invitee can be expected to discover them himself. *Weakley, supra* at 385; *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 497; 595 NW2d 152 (1999). Thus, the invitor's duty of care does not apply to conditions that are open and obvious, unless the condition poses an unreasonable risk of harm, despite its open and obvious nature. See *Abke, supra* at 361, citing *Millikin, supra* at 498-499 and 2 Restatement Torts, 2d, § 343A, p 218. An open and obvious danger is defined as a danger that is reasonably expected to be discovered by "'an average user with ordinary intelligence. . . upon casual inspection.'" *Hughes v PMG Building, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997) quoting *Eason v Coggins Memorial Christian Methodist Episcopal Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995). See also *Weakley, supra* at 385; *Abke, supra* at 361-362.

In the instant case, plaintiff does not dispute that the danger posed by the vertically stacked rolled roofing on the pallet was open and obvious or that the risk of harm existed only because he did not discover the condition or realize its danger. To the contrary, plaintiff admits that he knew of the condition and realized the danger of the rolled roofing falling and creating the risk of injury; however, he argues that defendant is nonetheless liable for his injuries because the risk of harm remained unreasonable, despite its open and obvious nature.

Whether a danger presents an unreasonable risk of harm, despite its open and obvious nature, is determined by considering the "'character, location, [and] surrounding conditions'" of the danger, *Bertrand, supra* at 617, quoting *Garrett v WS Butterfield Theatres*, 261 Mich 262, 263-264; 246 NW2d 57 (1933); *Spagnuolo v Rudds #2, Inc*, 221 Mich App 358, 360-361; 561 NW2d 500 (1997), and in order for the risk of injury to be an unreasonable one, a plaintiff must show that there is something unusual about the condition. *Bertrand, supra* at 617; *Milliken, supra* at 499.

Here, plaintiff failed to present any evidence that the "character, location, [or] surrounding conditions" of this particular pallet, located at floor level, stacked with rolls of roofing, was unusual. In addition, evidence was presented that defendant operated its store as a self-service operation; thus, customers were expected to remove merchandise from displays and in fact plaintiff had done so, on the same day and from the same display, without causing harm to himself or others. Further, there was evidence that defendant provided employees to assist customers with their merchandise when requested. In fact, defendant had installed buzzers and service counters throughout the store for this purpose. Indeed, plaintiff testified at his deposition

[1] The parties do not dispute that plaintiff was a business invitee at defendant's store.

that he understood that someone was probably available in the store to help, although not in the immediate area, but he decided not to seek assistance.[2] Based on this evidence, we are persuaded that defendant took reasonable steps to prevent harm to plaintiff. See *Hottman v Hottmann*, 226 Mich App 171, 176; 572 NW2d 259 (1997). Therefore, because plaintiff's risk of injury would have been eliminated had he requested assistance with obtaining his merchandise, *Abke*, *supra* at 363, citing *Hottmann*, *supra* at 176, and because plaintiff failed to show anything unusual in the character, location, or surroundings of the display, we conclude that there is no genuine issue of fact with regard to whether the roofing display presented an unreasonable risk of harm to plaintiff. Accordingly, the circuit court did not err in granting defendants summary disposition.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Michael R. Smolenski
/s/ William C. Whitbeck

[2] Although plaintiff's affidavit filed in opposition to defendant's motion for summary disposition that there were no signs posted to indicate that help was available for the loading or unloading of merchandise, plaintiff's deposition testimony of September 8, 1998 established that he understood someone was available to assist him but chose to remove the rolled roof by himself. Thus, his affidavit does nothing to create a genuine dispute about a material fact. See *Schultz v Auto-Owners Ins Co*, 212 Mich App 199, 202; 536 NW2d 784 (1995); *Barlow v John Crane-Houdaille, Inc*, 191 Mich App 244, 249-250, 477 NW2d 133 (1991).