STATE OF MICHIGAN

COURT OF APPEALS

DIANE MITCHELL,

Plaintiff-Appellant,

v

ALDI, INC.,

Defendant-Appellee.

UNPUBLISHED
March 5, 2002

No. 229072
Wayne Circuit Court
LC No. 99-932958-NO

Before: Bandstra, P.J., and Murphy and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was shopping on defendant's premises when she stepped into a large cardboard box to retrieve a box of crackers. The large box had been cut so that customers could reach or step into it. A lip had been left at the bottom of the box. Plaintiff successfully negotiated the lip, stepped into the box, and retrieved the crackers. As plaintiff was leaving the large box she tripped on the lip and fell to the floor, sustaining injuries.

Plaintiff's complaint alleged that she was on defendant's premises as a business invitee, and that defendant negligently failed to both maintain the premises in a safe condition and to warn of the unsafe condition. Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that it had no duty to warn plaintiff of the condition because the condition was open and obvious. The trial court granted the motion pursuant to MCR 2.116(C)(10), finding that an issue of material fact did not exist as to whether the condition was open and obvious.

We review a trial court's decision on a motion for summary disposition de novo. *Harrison v Olde Financial Corp*, 225 Mich App 601, 605; 572 NW2d 679 (1997). Under MCR 2.116(C)(10) a court is required to consider affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in a light most favorable to the non-moving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the

defendant's breach of duty proximately caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Berryman v K-Mart Corp*, 193 Mich App 88, 91-92; 483 NW2d 642 (1992).

A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. A possessor of land may be held liable for injuries resulting from negligent maintenance of the land. The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it for himself. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). 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 the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). If the risk of harm from a dangerous condition remains unreasonable, in spite of the fact that it is open and obvious or that the invitee has knowledge of it, the possessor of land must take reasonable care. *Bertrand*, *supra* at 611.

Plaintiff argues that the trial court erred by granting defendant's motion for summary disposition. We disagree and affirm. The evidence showed that the lip on the large box was irregular, but was large and was not shielded from view. Plaintiff acknowledged that she successfully negotiated the lip when she stepped into the box. The fact that she claimed that she did not see the lip when she moved to step out of the box is irrelevant. *Novotney*, *supra*, 477. It is reasonable to conclude that plaintiff would not have been injured had she been watching where she was walking. See *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 497; 595 NW2d 152 (1999). Plaintiff did not come forward with sufficient evidence to create a genuine issue of material fact as to whether an average person with ordinary intelligence would not have discovered the condition upon casual inspection. The trial court did not err in concluding that the conditions on defendant's premises constituted an open and obvious danger.

Furthermore, we find that plaintiff's argument that even assuming that the condition constituted an open and obvious danger it still presented an unreasonable risk of harm is without merit. Plaintiff's argument is based on the fact that the lip was the same color as the rest of the box and was not cut at a uniform height. However, had plaintiff simply watched her step, any risk of harm would have been obviated. See *Spagnuolo v Rudds #2, Inc*, 221 Mich App 358, 360; 561 NW2d 500 (1997). Summary disposition was proper.

Affirmed.

/s/ Richard A. Bandstra
/s/ William B. Murphy
/s/ Christopher M. Murray