

STATE OF MICHIGAN
COURT OF APPEALS

KEITH VALINSKI and NANCY VALINSKI,

Plaintiffs-Appellants,

v

LITTLE MEXICO RESTAURANT,

Defendant-Appellee.

UNPUBLISHED

September 24, 2002

No. 233446

Wayne Circuit Court

LC No. 00-013553-NO

Before: O’Connell, P.J., and Griffin and Hoekstra, JJ.

PER CURIAM.

Plaintiffs Keith and Nancy Valinski appeal as of right an order granting defendant Little Mexico Restaurant’s motion for summary disposition pursuant to MCR 2.116(C)(10) in this negligence action. We affirm.

Plaintiffs were patrons at Little Mexico when Keith grabbed the handle of a hot skillet of fajitas that was served to their table, causing burns and blistering on part of his right hand. There was conflicting deposition testimony among the parties regarding whether plaintiffs’ waitress warned them that the skillet and plates were hot, or whether the skillet’s handle was covered by an oven mitten, as the waitress maintained was defendant’s usual practice. Approximately one year earlier, Keith had suffered severe injuries in an electrical explosion at work, leaving him with, among other conditions, numbness in his hands. Keith testified that the numbness may have caused him to hold onto defendant’s skillet longer and suffer more damage than a person with normal sensation would have. In addition, the burn at Little Mexico prompted Keith to suffer painful memories of the electrical explosion he had endured a year earlier. Consequently, plaintiffs brought this lawsuit requesting damages in large part for Keith’s emotional injuries.¹

Plaintiffs first argue that because the open and obvious doctrine does not apply to this case as a matter of law, the trial court erred in granting defendant’s motion for summary disposition under the doctrine.² We disagree.

¹ Plaintiffs have not appealed dismissal of their complaint’s Counts II and III, Nancy’s claims for loss of consortium and negligent infliction of emotional distress.

² In a brief order, the trial court specifically granted summary disposition in reliance on *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 491-492, 497; 595 NW2d 152 (continued...)

A motion under MCR 2.116(C)(10) tests whether a claim has factual support. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition may be granted when, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. MCR 2.116(C)(10). When reviewing a trial court's decision to grant a motion for summary disposition, we examine all relevant "affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Maiden v Rozwood*, 461 Mich 109, 220; 597 NW2d 817 (1999). Appellate review of a summary disposition decision is de novo. *Spiek, supra* at 337.

In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. However, this duty does not generally encompass removal of open and obvious dangers [*Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001) (citation omitted).]

In *Glittenberg v Doughboy Recreational Industries, Inc (On Rehearing)*, 441 Mich 379, 392; 491 NW2d 208 (1992), quoting 3 American Law of Products Liability, 3d, § 33:26, p 56, our Supreme Court defined open and obvious dangers as "conditions that create a risk of harm [']that is visible, . . . is a well known danger, or . . . is discernible by casual inspection[']" (emphasis in original). A danger is open and obvious when the danger is known to the invitee or is so obvious that the invitee might reasonably be expected to discover it. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). In *Riddle, supra* at 94, quoting 2 Restatement of Torts, 2d, § 343A(1), the open and obvious doctrine was extended to "any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." In *Lugo, supra* at 516, our Supreme Court stated, "the open and obvious doctrine should not be viewed as some type of [']exception['] to the duty generally owed invitees, but rather as an integral part of the definition of that duty."

Plaintiffs specifically contend that the present case is distinguishable from the cases where the open and obvious doctrine has been applied because this case does not involve a condition on the land or a product. We disagree. Serving food items on a hot skillet could be considered an activity or condition on the land. In *Klimek v Drzewiecki*, 135 Mich App 115, 119; 352 NW2d 361 (1984), we held that a loose dog is a "condition on the land." Furthermore, a skillet could be considered a form of a product. In *Resteiner v Sturm, Ruger & Co, Inc*, 223 Mich App 374, 380; 566 NW2d 53 (1997) (White, P.J., concurring in part and dissenting in part, Griffin and Kolenda, JJ., concurring), we applied the open and obvious doctrine to a revolver as a product. See also *Glittenberg, supra* at 392 (products liability case). In *Eason v Coggins Memorial Christian Methodist Episcopal Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995), we applied the open and obvious doctrine to a ladder as an instrumentality in a premises liability case. Because a hot skillet can constitute an activity, condition on land, or a product to

(...continued)

(1999), a "trip and fall" case which held that the open and obvious doctrine is applicable where a plaintiff does not allege a failure to warn but does allege failure to maintain the premises in a reasonably safe condition.

which we have applied the open and obvious doctrine, the skillet in this case is within the scope of the doctrine.

Plaintiffs further argue that even if a hot skillet can be considered a condition on the land or a product within the scope of the open and obvious doctrine, the doctrine is still not applicable to the present case. We disagree. The present case falls within the non-exclusive list of activities to which we have applied the open and obvious doctrine. For example, we have applied the open and obvious doctrine to watching baseball. *Benejam v Detroit Tigers, Inc*, 246 Mich App 645, 660; 635 NW2d 219 (2001). In that case we stated that the “well-known risk that some object might leave the playing field and cause injury” was an open and obvious danger. Our Supreme Court has also held that “the risk of diving in shallow water [in a pool] is open and obvious.” *Glittenberg*, *supra* at 401.

Moreover, the duty a landowner owes to invitees “does not extend to conditions from which an unreasonable risk cannot be anticipated or to dangers so obvious and apparent that an invitee may be expected to discover them himself.” *Cunningham*, *supra* at 500. In the present case, the hot skillet was not an “unreasonable risk” that defendant should have anticipated, nor could plaintiffs have discovered the danger presented by the skillet handle. *Id.* Because defendant did not owe a duty to Keith to prevent him from touching the skillet handle, this situation is within the scope of the activities covered by *Riddle*, *supra* at 94.

Next, plaintiffs argue that the open and obvious doctrine is inapplicable because the danger presented by the skillet was not open and obvious. We disagree. Our Supreme Court defined open and obvious dangers as “conditions that create a risk of harm that [‘]is visible, . . . is a well known danger, or . . . is discernible by casual inspection.[’]” *Glittenberg*, *supra* at 392, quoting 3 American Law of Products Liability, 3d § 33:26, p 56 (emphasis omitted). First, the danger presented by the skillet was “visible.” *Id.* Keith testified that the skillets at Little Mexico sizzle when they are brought to the table. Second, the fact that the skillet was hot was “a well known danger.” *Id.* The fajitas plaintiffs ordered were called “sizzling fajitas” on the menu because of the smoke or steam and noise they produce when they are brought to the table. Finally, the danger created by the hot skillet was “discernible by casual inspection.” *Id.* Because the fajitas commonly smoke or steam and sizzle when they are brought to the table hot, only a “casual inspection” would be required to reveal the danger that the skillet was hot.

In *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997), we stated that the question is not “whether plaintiff should have known that the [condition] was hazardous, but . . . whether a reasonable person in his position would foresee the danger.” Again, because plaintiffs testified from past experience that the fajitas are usually hot, sizzling, and smoking or steaming when they are brought to the table, a reasonable person in Keith’s position would have known that the skillet was dangerous. Thus, summary disposition of plaintiffs’ claims pursuant to MCR 2.116(C)(10) was appropriate. *Hughes*, *supra* at 11.

Second, plaintiffs argue that assuming the open and obvious doctrine does apply, the trial court erred in dismissing their action because the danger presented by a hot skillet was unreasonably dangerous and because defendant anticipated that harm would result to plaintiffs. Again, we disagree.

An invitor does not have to protect an invitee from “conditions from which an unreasonable risk cannot be anticipated or to dangers so obvious and apparent that an invitee may be expected to discover them himself.” *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 500; 418 NW2d 381 (1988). In *Lugo, supra* at 517, our Supreme Court held, “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.” Our Supreme Court continued, “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.” *Id.* at 518-519.

An “unreasonable risk of harm” is described as follows:

[W]ith regard to open and obvious dangers, the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly “[s]pecial 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, i.e., whether the “[s]pecial aspect[”] of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability. [*Id.* at 517-518.]

Viewing all the evidence in a light most favorable to plaintiffs by assuming defendant did not warn Keith nor place a mitten on the skillet handle, *Maiden, supra* at 220, plaintiffs did not produce evidence that these circumstances qualified as “special aspects.” In *Lugo, supra* at 518, our Supreme Court stated that “special aspects” may be created by an “unreasonable risk of harm” or a “risk of severe harm.” First, our Supreme Court stated that a condition is “effectively unavoidable” creates an “unreasonable risk of harm.” *Id.* We hold that contact with the skillet handle was not “effectively unavoidable.” *Id.* Keith testified that the skillet was served on top of a wooden board. Defendant’s part-owner testified that plaintiffs’ waitress told Keith that if he had to move the skillet, he should grab the wood board beneath the skillet. Keith had three choices: grab the board, grab the skillet handle, or not grab the skillet at all. Because Keith had these alternatives, the danger from the skillet was not “effectively unavoidable,” and therefore, the skillet did not pose a “uniquely high risk of harm.” *Id.* at 519.

Second, the skillet handle did not create a “risk of severe harm.” *Id.* at 518. In *Lugo, supra* at 518, our Supreme Court described a “risk of severe harm” as a situation that creates a “substantial risk of death or severe injury.” Plaintiffs failed to introduce any evidence that a burn from a skillet handle could cause death or severe injury. Even though Keith held on to the skillet longer than a normal person would have because of the numbness in his hand, he testified that his burn only required a single trip to the emergency room and caused pain for “maybe a week.” Therefore, there were no “special aspects” that made the situation in the instant case unreasonably dangerous, and the trial court’s grant of summary disposition pursuant to MCR 2.116(C)(10) was proper.

Affirmed.

/s/ Peter D. O’Connell
/s/ Richard Allen Griffin
/s/ Joel P. Hoekstra