STATE OF MICHIGAN

COURT OF APPEALS

ANDREW LEE MICHALAK,

Plaintiff-Appellant,

v

ATLAS CONEY ISLAND RESTAURANT, INC., and AUTO-OWNERS INSURANCE COMPANY,

Defendants-Appellees.

UNPUBLISHED
April 27, 2004

No. 243224
Genesee Circuit Court
LC No. 01-071141-NO

Before: Bandstra, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

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

Plaintiff filed a premises liability action against defendants arising from injuries sustained at defendant restaurant when he tripped and fell over a highchair. The trial court granted defendants' MCR 2.116(C)(10) summary disposition motion finding the highchair to be an open and obvious condition.

Plaintiff argues that the trial court erred in failing to find a material fact regarding the highchair being an open and obvious condition when the chair was placed just around a corner obstructed from view by the back of a corner booth in a dimly lit part of the restaurant. In the alternative, plaintiff argues that the placement of the highchair and the surrounding conditions create an unreasonably dangerous condition. We disagree with plaintiff.

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; 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 Bldg, Inc*, 227 Mich App 1, 10; 574 NW2d 691 (1997).

Plaintiff entered the restaurant, walked down the main aisle to the back of the restaurant, and just as he began to make a right turn down the last aisle to find a booth to sit in, he tripped over a wooden highchair that was placed just around the corner up against the corner booth. Although plaintiff argues that he could not see the highchair before making the turn down the aisle, in his deposition he acknowledged that he should have seen the highchair, and that if he were looking for it, he would have seen the highchair.

The case at bar is similar to *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 495, 497; 595 NW2d 152 (1999). In *Millikin*, the plaintiff, while washing her mobile home, tripped over a supporting wire that extended from near the ground at the base of the home to a utility pole. *Id.* at 491. She claimed that the mobile home park failed to maintain the premises in a reasonably safe condition because of where it placed the wire. *Id.* The trial court granted the mobile home park's summary disposition motion finding the wire to be an open and obvious condition. This Court affirmed the trial court, finding that if Millikin simply saw the danger, she would not have tripped and fallen. *Id.* at 497. This Court reasoned that, "Having reviewed the pictures of the wire in its surroundings and plaintiff's deposition testimony that she would have seen the wire if she had looked up from her work . . . we conclude that no genuine issue of material fact was presented and summary disposition was appropriately granted." *Id.* at 497-498.

Similarly, we conclude based upon our review of the photographs and plaintiff's deposition testimony that if plaintiff simply paid attention to where he was walking, he would have seen and avoided the highchair. We find no issue of material fact regarding whether an average person of ordinary intelligence upon a casual inspection would have seen the highchair.

Plaintiff also argues that even if the condition was open and obvious, it contained a special aspect making it unreasonably dangerous.

Once a hazard is found to be open and obvious, the premises owner has no duty to warn or remove said open and obvious danger to a business invitee. *Lugo, supra* at 516. However, 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." *Id.* at 517.

In *Lugo, supra*, our Supreme Court set out illustrations explaining when "special aspects" make a particular condition unreasonably dangerous:

> 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 such 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 measures 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. [*Id.* at 518-519.]

In the case at bar, plaintiff argues that the condition at the restaurant fits the "effectively unavoidable" condition—illustrated by the Court as a patron of a store having to pass through standing water to reach the only exit. We disagree. First, plaintiff had two aisles of booths he could have sat in before he ever reached the last aisle in which he tripped over the highchair. Second, plaintiff's testimony and the photographs indicate that even in the third aisle, the highchair was pressed up against the corner booth, and therefore avoidable by a person who saw it. The condition was not "effectively unavoidable" and therefore not unreasonably dangerous.

Affirmed.

/s/ Richard A. Bandstra
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald