STATE OF MICHIGAN

COURT OF APPEALS

MILTON C. GRAMS,

Plaintiff-Appellant,

v

8611 THE GREAT ATLANTIC PACIFIC TEA COMPANY, d/b/a FARMER JACK,

Defendant-Appellee.

UNPUBLISHED
June 3, 2004

No. 246650
Macomb Circuit Court
LC No. 01-005175-NO

Before: Markey, P.J., and Wilder and Meter, JJ.

PER CURIAM.

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

Plaintiff entered defendant's store to purchase coffee cake. The cake was displayed on a table, the base of which was a solid block of wood. A wooden pallet topped with plastic-wrapped canned goods sat adjacent to and was the same height as the table. Plaintiff selected his merchandise and, as he was walking around the table and pallet, he tripped on a corner of the pallet and he fell to the floor, sustaining injuries. Plaintiff filed suit, alleging that defendant negligently failed to maintain the premises in a reasonably safe condition and to warn of the unsafe condition. The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10), finding that defendant owed no duty to plaintiff because the condition was open and obvious.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

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. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

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. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). A possessor of land may be held liable for

injuries resulting from negligent maintenance of the land. *Id.*, 610. The duty to protect an invitee does not extend to a condition that is so open and obvious that an invitee could be expected to discover it for himself, unless an unreasonable risk of harm remains. *Id.* at 610-612.

The open and obvious danger doctrine attacks the duty element that a plaintiff must establish in a prima facie negligence case. See *id*., 612. 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 special aspects of a condition make even an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions to protect an invitee from that risk. *Lugo v Ameritech Corp*, 464 Mich 512, 517; 629 NW2d 384 (2001). If such special aspects are lacking, the open and obvious condition is not unreasonably dangerous. *See id.*, 517-519.

Plaintiff argues that the trial court erred by granting defendant's motion for summary disposition. We disagree and affirm. Plaintiff admitted that before he fell he saw the display table without difficulty. The fact that plaintiff claims that he did not see the pallet until after he fell is irrelevant. *Novotney*, *supra*, 475. Reasonably prudent persons will take reasonable care for their own safety and watch their steps. See *Bertrand*, *supra*, 616-617. Plaintiff admitted that he could have walked around and was in the process of walking around the display area when the accident occurred. Absent special circumstances that did not allow for caution, a reasonably prudent person would refrain from putting his foot under a display in a manner that would cause him to trip and fall. See *id*. It is reasonable to conclude that plaintiff would not have tripped had he been paying attention to the area in which he 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 an issue of fact as to whether an average person with ordinary intelligence would have discovered the condition upon casual inspection prior to the incident.

Plaintiff erroneously relies on the "distraction" theory announced in *Jaworski v Great Scott Supermarkets, Inc*, 403 Mich 689, 699-700; 272 NW2d 518 (1978), a contributory negligence case holding that a patron in a self-service store is entitled to rely on the presumption that the proprietor will ensure that aisles are reasonably safe, considering that the patron's attention will be directed toward merchandise. The *Jaworski* reasoning applied where a duty had been found to exist. Here, because the pallet was open and obvious, no duty existed. See, e.g., *Bertrand*, *supra*, 609, and *Novotney*, *supra*, 473.

Plaintiff admitted that he could have avoided the table and pallet entirely as he left the display. Had plaintiff watched his step as he left the display, any risk of harm would have been obviated. See, generally, *Spagnuolo v Rudds #2, Inc*, 221 Mich App 358, 360-361; 561 NW2d 500 (1997). Plaintiff failed to demonstrate the existence of any special aspects that made the condition unreasonably dangerous in spite of its open and obvious nature. *Lugo*, *supra*, 517-519.

Affirmed.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter