STATE OF MICHIGAN

COURT OF APPEALS

JUDITH BATES,

Plaintiff-Appellant,

v

BURLINGTON COAT FACTORY WAREHOUSE OF AUBURN HILLS, INC.,

Defendant-Appellee.

UNPUBLISHED
November 18, 2004

No. 249479
Oakland Circuit Court
LC No. 02-042138-NO

Before: Borrello, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant. We affirm.

As plaintiff was shopping in defendant's store, she caught her foot on a display end cap. She tripped and fell, injuring her arm and elbow. On appeal, plaintiff argues that the trial court committed legal error when it granted defendant's motion for summary disposition and found that plaintiff presented no evidence demonstrating that there were special aspects to the end cap that caused her injuries, barring her claim based on the open and obvious doctrine.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion brought pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). The existence of a disputed fact must be established by admissible evidence, MCR 2.116(G)(6); *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163-164; 645 NW2d 643 (2000), and presented to the trial court at the time the motion was decided, MCR 2.116(G)(5), (6); *Peña v Ingham County Road Comm*, 255 Mich App 299, 310, 313 n 4; 660 NW2d 351 (2003).

An invitor 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. *Lugo v Ameritech Corporation*, 464 Mich 512, 516; 629 NW2d 384 (2001), citing *Bertrand v Alan Ford*, 449 Mich 606, 609; 537 NW2d 185 (1995). However: "[W]here the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 3; 649 NW2d 392 (2002), quoting *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). The test to determine if a danger is open and obvious is whether an average user with ordinary intelligence would have been able to discover the danger and risk presented upon casual inspection. *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002), quoting *Novotney v Burger King (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). The test is objective and the court should look to whether a reasonable person in the plaintiff's position would foresee the danger, not whether a particular plaintiff should have known that the condition was hazardous. *Corey, supra* at 5.

However, if there are "special aspects" of a condition that make even an "open and obvious" danger "unreasonably dangerous," the invitor maintains a duty to undertake reasonable precautions to protect invitees from such danger. *Mann v Shusteric Enterprises*, 470 Mich 320, 328-329; 683 NW2d 573 (2004). In *Lugo,* our Supreme Court concluded:

> the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly "special 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 "special 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. [*Lugo, supra at* 517-518.]

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 519. Typical open and obvious dangers, such as ordinary potholes in a parking lot or slippery steps that may involve "some potential for harm," do not give rise to special aspects because an ordinary prudent person will typically be able to see the condition and avoid it, and there is little risk of severe harm. *Id.* at 520; *Corey, supra* at 6-7. The *Lugo* Court provided two examples of situations that might involve special aspects and present a "substantial risk of death or severe injury," despite their open and obvious character: a commercial building with only one exit for the general public where the floor is covered with standing water and an unguarded thirty foot deep pit in the middle of a parking lot. *Lugo, supra* at 518.

Plaintiff first argues that the dangers presented by the end cap were not open and obvious because they were not discoverable upon casual inspection. Specifically, plaintiff contends that the lack of contrasting color between the platform shelf and the floor, the carpet or rug that hung over the base of the shelf, the low height of the shelf creating a three to five inch gap with the floor, and the distracting merchandise surrounding the end cap made the dangers undiscoverable upon casual inspection. Review of the photographs reveal that the beige shelf, partially covered with a dark rug, hung over both a dark colored floor and a beige floor. The side of the beige shelf was visible. The shelf contrasted with both the dark and white floor. The contrasting

colors would allow a shopper to notice, upon casually inspecting her surroundings as she passed by, a gap between an end cap shelf and the floor. While plaintiff would have this Court conclude that a person with ordinary intelligence would not have been able to discover the dangers she sets forth, plaintiff's own daughters rounded this corner only seconds before her without incident. Furthermore, defendant has never had any other incidents of slip and fall involving its end caps. Plaintiff has been shopping at retail stores for over twenty years at the frequency of approximately two times per month. Although plaintiff cannot recall visiting defendant's store prior to this occasion, she has shopped at Burlington Coat Factory stores in the past. Finally, the fact that merchandise happened to be displayed on the shelves prior to plaintiff's encounter with the end cap, and upon which plaintiff's attention was focused, does not make the end cap any less apparent to a reasonable person and casual observer. *Corey, supra* at 5. Accordingly, even if we were to conclude that the end cap presented a danger, it was open and obvious as those terms have been defined by our Supreme Court.

Plaintiff next argues that, even if the hazards of the end cap were open and obvious, special aspects of it created an unreasonable risk of harm subjecting defendant to liability for her injuries. Plaintiff refers to no additional facts or evidence regarding the condition of the end cap, with the exception of a publication declaring that merchandise displays in retail stores distract customers and remove their attention away from the floor and walking process, and consequently, stores must take special precautions to remove hazards that cause people to slip and fall. While that may be so, these facts do not constitute special aspects subjecting defendant to liability under *Lugo*.

In *Lugo*, our Supreme Court held that the defendant was entitled to summary disposition under MCR 2.116(C)(10) because the plaintiff failed to establish that special aspects of a pothole existed making it unreasonably dangerous. *Lugo, supra* at 520-523. The plaintiff tripped and fell on a common pothole because she failed to notice it. The plaintiff argued that she was distracted by moving vehicles in the parking lot. The Supreme Court concluded that potholes in pavement are everyday occurrences and should be observed by the reasonably prudent person, and that there is nothing unusual about vehicles being driven in a parking lot that would remove the situation from the open and obvious doctrine. *Id*. at 522. Unlike falling an extended distance, the Court reasoned that "it cannot be expected that a typical person tripping on a pothole and falling to the ground would suffer severe injury." *Id*. at 520.[1]

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[1] Plaintiff contends that even after the Supreme Court's decision in *Lugo*, *Riddle*, *supra*, 440 Mich 85, and *Bertrand*, *supra*, 449 Mich 606, continue to stand for the principle that an invitor remains liable for unreasonable risks of harm from open and obvious dangers when it should anticipate the harm, no matter the severity of harm or degree of risk the condition presents. Plaintiff, however, misses the point of *Lugo*. *Lugo* affirms this principle in general, but in an effort to clarify the scope of the open and obvious doctrine, *Wellman v Walmart Stores*, 192 F Supp 2d 767, 769 (WD Mich, 2002), the Supreme Court in *Lugo* held that, when a danger is open and obvious, an invitor's duty to warn or protect only remains if special aspects of the condition exist. *Lugo, supra*, 464 Mich 516-518. The *Lugo* Court went on to define precisely what would constitute a special aspect. Thus, while the standards that plaintiff points to in *Riddle* and *Bertrand* apply generally, this Court is bound to apply the specific standards set forth
(continued…)

Similarly, in *Corey*, this Court held that there were no special aspects of slippery steps that created a uniquely high likelihood of harm or severity of harm. *Corey, supra* at 6-7. The plaintiff saw the slippery condition created by snow and ice on a three-stepped stairway and knew that there was an alternate route into the building that was close by, but he nevertheless attempted to use the stairs. *Id.* at 2, 6-7. While noting that the steps likely created "some potential for severe harm," the Court concluded that it has "no doubt that these circumstances are not the type of special aspects that *Lugo* contemplated." *Id.* at 7. The Court reasoned that the risk of injury from falling several feet to the ground is not the same as falling an extended distance into a thirty foot deep pit because falling thirty feet presents "such a *substantial risk of death or severe injury* . . . that it would be unreasonably dangerous to maintain the condition." *Id.*, quoting *Lugo*, *supra* at 518 (emphasis in original).

In the present case, plaintiff claims that she was distracted by the merchandise displayed on the shelves of the aisle and, as a result, she failed to notice the end cap, causing her to trip and fall. As the trial court noted, end caps are common in retail stores. Shoppers typically encounter them as they peruse the aisles. Shoppers can anticipate that they will be present between each aisle. While the condition of this particular end cap may give rise to "some" potential for harm, like the conditions in *Lugo* and *Corey*, it cannot be expected that a person who trips on an end cap and falls only a few feet to the floor would suffer a severe injury. *Id.* Put another way, even if this end cap was as dangerous as plaintiff claims it was, the risk it creates does not rise to the level of a "substantial risk of death or severe injury." *Lugo, supra* at 518. For these reasons, we are bound by the decisions of our Supreme Court to conclude that defendant's end cap does not possess any special aspects that would prevail in imposing liability on defendant. Accordingly, plaintiff has not demonstrated that a material fact existed for trial, and we therefore affirm the trial court's order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10).

Affirmed.

/s/ Stephen L. Borrello
/s/ William B. Murphy
/s/ Janet T. Neff

(…continued)

in *Lugo*.