# STATE OF MICHIGAN

# COURT OF APPEALS

KAREN BRUDER,

Plaintiff-Appellant,

v

HOME DEPOT USA, INC., and LESTER ELLERHORST,

Defendants-Appellees.

UNPUBLISHED
October 23, 2007

No. 272804
Grand Traverse Circuit Court
LC No. 05-024876-NZ

Before: Bandstra, P.J., and Talbot and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals by right from the trial court's order granting defendants' motion for summary disposition under MCR 2.116(C)(10) on plaintiff's claim for damages. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

While shopping at a Home Deport store with her husband, plaintiff stepped backwards, without looking, to avoid an approaching customer with a shopping cart, and tripped over a store merchandise cart that was in the aisle. Plaintiff struck her left ring finger on the merchandise cart, which required surgical repair and the insertion of a pin to straighten the finger. Plaintiff sued Home Depot and her salesman, Lester Ellerhorst, alleging their negligence in failing to inspect and to keep the premises in reasonably safe condition and free of latent hazards and defects, in failing to provide plaintiff with a reasonable means of egress, in failing to use reasonable care to protect plaintiff from hazards on the premises, in failing to warn plaintiff of concealed and unreasonably dangerous conditions, and in failing to keep aisles free from obstructions. Defendants moved for summary disposition under MCR 2.116(C)(10), arguing that the merchandise cart was an open and obvious danger. The parties provided differing descriptions of the merchandise cart. Accepting plaintiff's description, the trial court nonetheless found that the average person of ordinary intelligence would have been able to discover the cart and the risk it presented upon casual inspection, and the court granted defendants' motion for summary disposition.

This Court reviews de novo the grant or denial of summary disposition. *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 567; 702 NW2d 539 (2005). A motion under MCR 2.116(C)(10) tests the factual support for a claim examining the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. *McClements v Ford Motor Co*, 473 Mich 373, 380; 702 NW2d 166 (2005).

Plaintiff raises three issues on appeal. First, plaintiff claims that the trial court impermissibly weighed the evidence, essentially determined that the Bruders were mistaken about the description of the cart, and then concluded that the cart was an open and obvious condition. We disagree. The trial court did not weigh the evidence and did not decide any factual issue. Rather, the parties' dispute over the description of the cart was irrelevant to the trial court's ruling. In granting summary disposition to defendants, the trial court specifically relied on plaintiff's description of the cart, stating that in granting summary disposition the court was "taking the Plaintiff's version of events." Thus, far from weighing the evidence and deciding a disputed factual issue in favor of defendants, the trial court considered the evidence in the light most favorable to plaintiff and still granted summary disposition to defendants.

Second, plaintiff claims that the trial court erred in concluding that the cart was an open and obvious hazard by disregarding the testimony of the Bruders and Ellerhorst that they had casually inspected the aisle and that none of them saw the cart as they walked to the storm doors. Again, we disagree. A dangerous condition is open and obvious where "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). Thus, if a condition is dangerous only because a particular invitee does not discover the condition or realize its danger, the open and obvious doctrine precludes liability for the possessor of the premises. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995); *Novotney, supra* at 474-475.

In this case, the Bruders described the merchandise cart as a sizeable, gray metal deck with no cross-hatching that rose about three to four inches above the floor with no upright bars. Objectively assessed, an item with those characteristics, even without upright bars, is readily discoverable by an average user with ordinary intelligence upon casual observation. Even if the cart and the floor had similar colors, we conclude that it objectively would still be discoverable upon casual inspection because it was elevated three to four inches above the floor. Further, plaintiff admits that she did not check in back of her when she stepped back to let the approaching customer pass by her. Thus, we also conclude the merchandise cart presented a hazard to plaintiff only because she did not discover the cart by looking where she was stepping.

Finally, plaintiff claims that she alleged an ordinary negligence claim that the trial court disregarded. She maintains that Ellerhorst had a duty to warn her of the cart as a tripping hazard because he was directing plaintiff's attention to the storm door display on a wall while trying to sell her a door. Plaintiff claims that the trial court erroneously disregarded her ordinary negligence claim and applied the open and obvious doctrine as though it were a premises liability claim. Relying on *Clark v Kmart Corp*, 465 Mich 416; 634 NW2d 347 (2001), plaintiff argues that the open and obvious doctrine does not apply to ordinary negligence claims based on conditions inside stores, such as a trip hazards in aisles. She further maintains that, because a customer's attention is directed to the merchandise inside a store, a storekeeper has a duty to keep the aisles clear and to warn customers of trip hazards on the floor.

The open and obvious doctrine applies to negligence claims based on the theory of premises liability. *Bertrand, supra* at 614; *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96-97; 485 NW2d 676 (1992). In this case, plaintiff's theory of liability is based on the condition of defendant Home Depot's premises, where she, a business invitee, was injured. In her complaint, plaintiff alleges that defendants owed her a duty to inspect and keep the premises

free of latent hazards and defects, to provide reasonable and safe means of access to, from, and within the store, to use reasonable care to warn her about to protect her from known hazards in the store, and to keep the store's aisles free from obstructions. All of these duties are aspects of premises liability. Further, simply arguing or even pleading that a salesperson failed to warn a customer of a hazard inside a store does not transform a premises liability claim into an ordinary negligence claim. As this Court stated in *Laier v Kitchen,* 266 Mich App 482, 489-490; 702 NW2d 199 (2005), "the [open and obvious] doctrine applies to a premises liability case whether the plaintiff has pleaded the claim as a failure to warn of a dangerous condition or as a breach of duty in allowing the dangerous condition to exist." See also *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 497; 595 NW2d 152 (1999).

In this case, plaintiff alleges that Ellerhorst failed to warn plaintiff of the cart that she claimed was a trip hazard in defendant Home Depot's store. Plaintiff does not allege that Ellerhorst otherwise engaged in any negligent conduct independent of her theory of premises liability. Under *Laier* and *Millikin,* the trial court properly treated plaintiff's claim against Ellerhorst as a premises liability claim, which is subject to the open and obvious doctrine.

Affirmed.

/s/ Richard A. Bandstra
/s/ Michael J. Talbot
/s/ Karen M. Fort Hood