STATE OF MICHIGAN

COURT OF APPEALS

RONALD THORNE, a legally incapacitated person, by MARGAREET ANN WILSON, guardian and conservator,

Plaintiff-Appellant,

and

BLUE CROSS BLUE SHIELD,

Intervening Plaintiff

v

GREAT ATLANTIC & PACIFIC TEA CO. INC., d.b.a FARMER JACKS,

Defendant-Appellee.

UNPUBLISHED
March 4, 2010

No. 281906
Macomb Circuit Court
LC No. 2006-002549-NO

Before: Hood, P.J., and Wilder and Borrello, JJ.

PER CURIAM.

Plaintiff appeals of right from the trial court's summary disposition in defendant's favor, in this action arising out of Ronald Thorne's accidental slip and fall in a grocery store owned by defendant. We affirm.

Plaintiff was at a Farmer Jack's grocery store when he slipped and fell after stepping on some grapes on the floor. A store video captured the area of the fall for 20 minutes before and after the incident.

Plaintiff's first amended complaint, containing one count titled negligence, alleges that defendant was a storekeeper having "the duty of due and reasonable care to maintain and/or repair its premises, provide a safe environment and to protect Plaintiff from unsafe conditions," that defendant "breached its duties and was negligent in . . . failing to maintain the premises in a reasonably safe condition"; "failing to adequately inspect . . . or assess the premises for hazards"; "failing to make necessary repairs after having actual and/or constructive notice of the hazard"; and "failing to provide appropriate storage and/or bins for display of grapes to prevent grapes being dropped/spilled onto the floor," and further alleging that:

> the *unsafe condition* which caused Plaintiff . . . to fall was either caused by the active negligence of Defendant and/or its agents . . . and/or Defendant and/or its agents . . . knew of the unsafe condition; and/or the unsafe condition was of such a character or existed a sufficient length of time that Defendant and/or its agents . . . should have known of the *unsafe condition*. [Emphasis added.]

After reviewing the store video, the circuit court granted defendant's motion for summary disposition, concluding that plaintiff's claims sounded in premises liability rather than ordinary negligence, and further, that the alleged unsafe condition was open and obvious. The circuit court also concluded that Plaintiff's assertions of active negligence by defendant's employees were "not viable," because the claims and the evidence that purportedly supported them were speculative.

We review summary dispositions de novo. *Willett v Waterford Charter Twp*, 271 Mich App 38; 718 NW2d 386 (2006).

Michigan law distinguishes between a claim sounding in ordinary negligence, and a premises liability claim. *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001). The applicability of the open and obvious danger doctrine is dependent on the theory of liability presented by the pleader, and on the nature of the duty at issue. *Hiner v Mojica*, 271 Mich App 604, 615; 722 NW2d 914 (2006). The doctrine is applicable only to premises liability actions, and product liability cases involving a failure to warn, and is not applicable to actions asserting claims of ordinary negligence. *Id.* at 615-616. When an injury develops from a condition of the land, rather than from an activity or conduct that created the condition thereon, the action sounds in premises liability. *James, supra*, 464 Mich at 18-19.

Plaintiff contends that his allegation of active negligence on the part of defendant's employees is sufficient to render his complaint one that sounds in ordinary negligence. We disagree. Michigan courts are not bound by the labels attached to claims by the parties. *Randall v Harrold*, 121 Mich App 212, 217; 328 NW2d 622 (1982). For instance, when evaluating whether a claim or action is barred by the statute of limitations, a Michigan court may look beyond the label in the pleading to the substance of the allegations made, in order to determine which statute of limitations applies. *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989).

In the instant case, plaintiff's first amended complaint alleges that his slip and fall emanated from the existence of an unsafe condition on defendant's premises, that being the presence of grapes on the floor. Plaintiff's complaint repeatedly refers to the "condition on the premises" as the cause of plaintiff's fall. As such, because plaintiff's injury arises out of the condition of the premises, plaintiff's claim sounds in premises liability, and is subject to analysis under the open and obvious danger doctrine. *James, supra*, 464 Mich at 18-19.

After the circuit court reviewed the store video of plaintiff's fall, it concluded that while defendant's employee was wheeling a cart in front of the apple display near the black mat that plaintiff eventually fell on, neither at the time Mr. Thorpe fell nor at anytime before did the cart obscure the mat. The circuit court also concluded that the cart did not obscure the grapes at the time of the fall, and, therefore, relied on *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710; 737 NW2d 179 (2007), in which a similar fruit-on-the-floor related accident occurred.

Kennedy, a customer, slipped on green grapes and "green haze" in a Farmer Jack store. The circuit court's reliance on *Kennedy* is sound, because that case is factually analogous. The circuit court in *Kennedy* noted that after the plaintiff's fall, when he looked at the floor, plaintiff and several other people readily observed the crushed grapes. This Court affirmed summary disposition in *Kennedy*.

The circuit court reasoned that because Mr. Thorne testified that he too observed the grapes after he fell, and further that because the video revealed that the grapes were readily observable before he fell, reasonable factfinders could only conclude that the grapes were an open and obvious hazard. We agree. The video does not show that the cart being moved by the employee was obscuring the area of the floor on which plaintiff slipped. Taking the evidence in a light most favorable to plaintiff, and in light of *Kennedy*, the grapes on the floor were open and obvious.

Defendant argues, in the alternative, that it was not on notice of the alleged defect on the premises. An occupier of land is "liable for injury resulting from an unsafe condition either caused by the active negligence of itself and its employees or, if otherwise caused, where known to the storekeeper or the condition is of such a character or has existed a sufficient length of time that it should have had knowledge of it." *Hampton v Waste Management of Michigan, Inc*, 236 Mich App 598, 604; 601 NW2d 172 (1999) (internal brackets, quotation marks, and italics omitted).

We agree with this argument as well. The video does not show how long the grapes were on the floor, and while plaintiff argues that defendant's employees pointed to the grapes on the floor, long prior to his fall, the video shows that these employees were pointing to a different area, closer to the camera. Thus, plaintiff's arguments in this regard are mere speculation. Accordingly, viewing the evidence in a light most favorable to plaintiff, there is insufficient evidence that defendant was on actual or constructive notice of the condition that actually caused the accident.

Even if we were to construe plaintiff's complaint as having alleged that his injury arose from the active negligence of defendant's employees rather than a condition on the premises, the circuit court did not err in concluding that to the extent this theory was sufficiently pleaded, plaintiff presented insufficient evidence to withstand defendant's motion for summary disposition.

Plaintiff relies on *Clark v K Mart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001), a case in which the claimant slipped on "several loose grapes that were scattered on the floor . . . ." Our Supreme Court defined the duty of a storekeeper as follows:

> to provide reasonably safe aisles for customers and he is liable for injury resulting from an unsafe condition either caused by the active negligence of himself and his employees *or, if otherwise caused, where known to the storekeeper or is of such a character or has existed a sufficient length of time that he should have had knowledge of it.* [*Id.* (internal quotation marks and citations omitted; emphasis added).]

As the circuit court concluded, and as we noted previously, plaintiff's theory of active negligence is based on speculation and conjecture. The direct evidence established that the incident occurred in front on an apple display. Defendant's employee testified that he was unloading apples from the crates and not grapes, and that there were no grapes in the crates he was unloading. The video does not contradict this testimony, and does not show how long the grapes were on the floor before plaintiff slipped and fell on them. Therefore, any claim by plaintiff that defendant's employee was actively negligent in unloading grapes, and that from this active negligence plaintiff's injury arose, is not supported by the evidence.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello