STATE OF MICHIGAN

COURT OF APPEALS

MARCIA MILLER,

Plaintiff-Appellant,

v

DUNHAM'S DISCOUNT SPORTS,

Defendant-Appellee.

UNPUBLISHED
December 16, 2010

No. 294445
Jackson Circuit Court
LC No. 08-003696-NO

Before: JANSEN, P.J., and SAWYER and O'CONNELL, JJ.

PER CURIAM.

Plaintiff Marcia Miller broke her foot when she fell while attempting to get off an elliptical machine at defendant Dunham's Discount Sports in Jackson. The trial court granted summary disposition for defendant, and plaintiff appeals as of right. This appeal has been decided without oral argument pursuant to MCR 7.214(E). We affirm.

We review a trial court's summary disposition ruling de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion granted under MCR 2.116(C)(10), this Court considers the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties in a light most favorable to the nonmoving party. *The Cadle Co v City of Kentwood*, 285 Mich App 240, 247; 776 NW2d 145 (2009). A motion for summary disposition under MCR 2.116(C)(10) may be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Campbell v Human Services Dep't*, 286 Mich App 230, 235; 780 NW2d 586 (2009). This Court is liberal in finding genuine issues of material fact. *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008).

A business has a duty to use reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the property. See *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). This duty generally does not include protecting an invitee from open and obvious conditions. *Id.* at 517. A condition is open and obvious when an average person of ordinary intelligence could discover the danger and the risk presented with a casual inspection. *Bialick v Megan Mary, Inc*, 286 Mich App 359, 363; 780 NW2d 599 (2009). Nonetheless, a business has a duty to take reasonable precautions to protect an invitee from an open and obvious condition with special aspects that make the condition unreasonably dangerous. *Lugo*, 464 Mich at 517. However, "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." *Lugo*, 464 Mich at 519.

In this case, plaintiff was injured as she got off an elliptical machine at defendant's sporting goods store. There is evidence that the elliptical machine was in a row of machines with only a narrow space between each machine—about three or four inches apart. We agree with the trial court that the close proximity of the machines was an open and obvious danger. Nothing prevented plaintiff from seeing the machines side-by-side in close proximity. Indeed, plaintiff indicated that she noticed their close proximity before getting on the elliptical. The machines' close proximity significantly reduced the available amount of level flooring to get on or off the machine. An average person of ordinary intelligence would be aware of the risk of tripping or falling when attempting to get on and off an exercise machine that has been placed three inches away from another machine.

An exception to the open and obvious rule is whether there are special aspects present that make a situation unavoidable and unreasonably dangerous. *Id.* at 518. The Supreme Court has provided two examples of situations where the special aspects of open and obvious conditions render a condition unreasonably dangerous. See *id.* at 518-519. One example is a commercial building with only one exit where the floor next to the exit is covered with standing water—an unavoidable condition presenting a high likelihood of harm. *Id.* The other example provided in Lugo is a thirty-foot pit in a parking lot—the danger open and obvious, but presents an unreasonably dangerous situation. *Id.* Additionally, this Court has held that ice completely covering a gas station's parking lot was an effectively unavoidable condition that fit the special aspects exception to the open and obvious rule. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 593-594; 708 NW2d 749 (2005).

The standard is whether the reasonable person would have gotten on the elliptical, seeing the danger, and whether a reasonable person would have looked before getting off the elliptical. See *Bialick*, 286 Mich App at 363. An elliptical machine has moving parts that require a person to use care when attempting to get on and off the machine. The elliptical in this case required defendant's patrons to use an even higher degree of care because of its close proximity to other machines. But, the facts show that plaintiff knew that the exercise machines were placed very close together, and she decided to test the elliptical without asking for assistance. The facts also show that, even though plaintiff knew that the machines were placed close together, she did not look to see if she would have a safe place to put her foot before dismounting the elliptical. Plaintiff did not take the precautions that a reasonable person would have taken if confronted with a similar situation.

Here, there was no special aspect that made the elliptical machine unreasonably dangerous, or made the danger of falling unavoidable. The facts in this case are distinguishable from the facts in *Robertson* that give us an example of a special aspect. In that case, the plaintiff went to a gas station to buy windshield washer fluid. The gas station's lot was completely covered in ice, and the plaintiff fell while walking across it to enter the gas station. This Court held that the special aspects exception applied because the snowy conditions of that day would have made it sufficiently unsafe to drive away without windshield washer fluid. *Robertson*, 268 Mich App at 594. The danger in *Robertson* was in entering the store, not testing the product that the store was selling. Similarly, the danger in the example in Lugo forced the person to confront

the open and obvious danger of the standing water that blocked the only entrance to the building. *Lugo*, 464 Mich at 519. Here, there was no pressing reason for plaintiff to confront the open and obvious dangers of the placement of the elliptical.

The danger was open and obvious, and the special aspects exception does not apply. We affirm the trial court's decision to grant summary disposition to defendant.

Affirmed. Defendant may tax costs.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Peter D. O'Connell