STATE OF MICHIGAN

COURT OF APPEALS

TERRI PRICE and DOUGLAS PRICE, Plaintiffs-Appellants, v KROGER COMPANY OF MICHIGAN, Defendant-Appellee.	FOR PUBLICATION June 18, 2009 9:00 a.m. No. 281934 Ingham Circuit Court LC No. 07-000005-NO Advance Sheets Version

Before: Talbot, P.J., and Bandstra and Gleicher, JJ.

GLEICHER, J.

In this premises liability action, plaintiffs appeal as of right from a circuit court order granting defendant summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand, and decide this appeal without oral argument under MCR 7.214(E).[1]

Plaintiff Terri Price visited a Kroger store while en route to work on the morning of February 6, 2004. Several hours before plaintiff arrived, Josephine Ridge, a Kroger employee, obtained a large wire bin from a back storage area and placed it in front of a checkout aisle. Ridge filled the bin with sale candy. Ridge admitted at her deposition that although she had inspected the bin before placing it on the shopping floor, she failed to notice any protruding wires.

Plaintiff described in deposition testimony that as she walked toward a checkout aisle, she noticed a square, waist-high metal basket, approximately four-feet wide, containing sale candy. Plaintiff approached the bin, reached into it, retrieved several bags of candy, and turned to walk away. While taking a first step toward the checkout aisle, plaintiff fell to the floor. From plaintiff's vantage point on the floor, she observed a one-inch-long broken wire or "barb" protruding from the bin at ankle level. Plaintiff testified that the candy-filled bin had blocked her view of the protruding wire before she fell. Plaintiff described her discovery of the protruding prong as follows:

[1] We publish this case pursuant to MCR 7.215(A). The majority did not request publication.

Q. When you were on the floor, you were able to see the part of the wire basket that protruded into the aisle approximately an inch?

A. Yes, yes.

Q. You were able to see its dimensions while you were on the floor?

A. No, not really. I didn't actually know what caught me.

Q. You removed it from your pant leg?

A. When I scooted over, because I thought what, you know how you fall, you go what, and that's when I says [sic], oh, caught me, you know like that, yeah.

Q. So when you realized what it was that caught your pant leg, you say that it was part of the wire basket?

A. Yeah, I wasn't sure. So I went over and I went, because I couldn't see it, I mean, I wouldn't have been able to see it—just walking up to it, you wouldn't see it.

Q. Why is that?

A. Because it was so low to the ground. It was probably this far from the ground.

Q. Would you say two or three inches from the ground?

A. Yeah, just at your ankles, or not your ankles, just tops of your shoes.

Ridge recalled that she "threw [the bin] in the trash compactor" after plaintiff's fall.

The circuit court granted defendant's motion for summary disposition under MCR 2.116(C)(10), ruling as a matter of law "that the condition complained of by Plaintiff was open and obvious." The court emphasized that plaintiff had conceded "that there was nothing blocking her view of the metal prong" and that "it is reasonable to conclude that Plaintiff would have not been caught on the metal prong had she been watching where she was going." The court additionally noted that plaintiff had "failed to produce evidence to create an issue of fact concerning whether an average person with ordinary intelligence would have discovered the condition upon casual inspection." The court further rejected "that the metal prong was unavoidable or posed an unreasonably high risk of severe injury."

This Court reviews de novo the circuit court's summary disposition ruling. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court may grant summary disposition under subrule C(10) if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.* "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant

documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). When the record leaves open an issue on which reasonable minds could differ, a genuine issue of material fact exists that precludes summary disposition. *West*, *supra* at 183. A court may not make findings of fact when deciding a summary disposition motion. *Jackhill Oil Co v Powell Production, Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995).

As the property owner in control of the premises, defendant owed plaintiff, a business invitee, a duty to inspect the premises for hazards that might cause injury. Plaintiff was entitled to "the highest level of protection" imposed under premises liability law. *James v Alberts*, 464 Mich 12, 20; 626 NW2d 158 (2001), quoting *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000). The landowner's duty encompasses not only warning an invitee of any known dangers, "'but the additional obligation to also make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards.'" *James*, *supra* at 19-20; quoting *Stitt*, *supra* at 597.

"However, where 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." *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). When a potentially dangerous condition "is wholly revealed by casual observation," the premises owner owes its invitees no duty to warn of the danger's existence. *Novotney v Burger King Corp* (*On Remand*), 198 Mich App 470, 474; 499 NW2d 379 (1993). This is so because "an obvious danger is no danger to a reasonably careful person." *Id.* at 474. The test for an open and obvious danger focuses on the inquiry: Would an average person of ordinary intelligence discover the danger and the risk it presented on casual inspection? *Id*. at 475.

Our Supreme Court has explicitly cautioned that when applying this test, "it is important for courts . . . to focus on the objective nature of the condition of the premises at issue, not the subjective degree of care used by the plaintiff." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 523-524; 629 NW2d 384 (2001). The proper question is not whether *this plaintiff* could or should have discovered the protruding wire, but whether the wire was observable to the average, casual observer. *Novotney*, *supra* at 475. See also *Lugo*, *supra* at 523:

> The trial court's remarks indicate that it may have granted summary disposition in favor of defendant because the plaintiff "was walking along without paying proper attention to the circumstances where she was walking." However, in resolving an issue regarding the open and obvious doctrine, the question is whether the *condition of the premises* at issue was open and obvious . . . . [Emphasis in original.]

We conclude that plaintiffs produced "sufficient evidence to create a genuine issue of material fact that an ordinary user upon casual inspection could not have discovered the existence" of the one-inch-long, ankle-level wire. *Novotney*, *supra* at 475. The evidence of record establishes that neither plaintiff Terri Price nor defendant knew that a wire protruded from

the bin until after plaintiff fell. Given the extremely small size of the offending barb and its location immediately adjacent to the wire bin at ankle level, we reject the circuit court's conclusion that, as a matter of law, plaintiff should have discovered it "upon casual inspection" of the bin. A jury could reasonably infer that a casual inspection of the premises in which plaintiff shopped would not have revealed the barb, in light of its small size, its location at close to floor level, the impediment to visibility posed by the bulk of the candy-filled bin, and Ridge's failure to detect the anomaly, notwithstanding her greater ability and opportunity to examine the bin before placing it in an area of the store accessible to shoppers like plaintiff.

In conclusion, because the record gives rise to a material question of fact regarding whether the danger posed by the protruding wire qualified as open and obvious, a jury must make this factual determination.

We reverse the circuit court's order granting summary disposition and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Michael J. Talbot