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 No. 281934 Ingham Circuit Court LC No. 07-000005-NO Advance Sheets Version

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

BANDSTRA, J. (*dissenting*).

I respectfully dissent and would affirm.

Anyone confronted with the physical world knows that accidents happen. As a result, people sometimes get hurt. In the natural course of things, the injured person bears the cost of the accident. In the legal course of things, an injured person may become a plaintiff and seek to impose the cost of an injury upon someone else.

Generally, our tort law is designed to fairly determine when an injured person may succeed in that quest. In other words, an injured person may not do so in every case; not every accident results from the action of a culpable party. Instead, a plaintiff must meet the burden of proof that our law has established for whatever theory of liability is advanced.

The theory plaintiffs advance here is one of premises liability and, more specifically, premises liability with respect to an invitee. As the lead opinion correctly points out, in this context our law imposes the highest obligation on a possessor of property, the duty to inspect the premises for hazards that might cause injury, not just to take precautions against the risks of any dangers that are already known.

Nonetheless, there must be some significant danger or hazard which, upon inspection, the possessor should have detected. Our law in this area stems from the Second Restatement of Torts and its provisions regarding "dangerous conditions" that involve "an unreasonable risk of harm" to invitees. See, e.g., *Bertrand v Allen Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995), quoting 2 Restatement Torts, 2d, § 343, pp 215-216. Ever since *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988), according to our Supreme Court, a possessor's duty is "to exercise reasonable care to protect invitees from an unreasonable risk of

harm caused by a dangerous condition of the land." See *Bertrand, supra* at 609; *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001); *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425 n 2; 751 NW2d 8 (2008). As emphasized by Justice Cavanagh, the dangerous condition must involve "an *unreasonable* risk of harm" to an invitee, *Bertrand, supra* at 609 (emphasis in original). Accordingly, as Justice Cavanagh stated in *Williams, supra* at 500, a premises possessor's obligation is not "absolute"; invitee premises liability "does not extend to conditions from which an unreasonable risk cannot be anticipated." So, to impose liability on a possessor, an invitee must show not only that there was a risk, but also that the risk was unreasonable.

As suggested earlier, our physical world is filled with a myriad variety of slight imperfections (e.g., misaligned joints, sharp corners, misshapen surfaces, etc.) that may cause bruises, abrasions, or other accidental injuries. The question here, under the Supreme Court cases just discussed, is simple: did the one-inch wire, protruding from the bin about half the length of an average adult pinky finger, constitute a "dangerous condition" presenting "an unreasonable risk of harm"? Or, instead, was it a "condition from which an unreasonable risk (could not) be anticipated"? As suggested by Justice Cavanagh in his use of the word "anticipated," we cannot determine that question retrospectively, i.e., taking into account the fact that a harm has allegedly occurred because of the one-inch wire. Instead, the question is whether defendant here could have anticipated in advance that the one-inch wire was a "dangerous condition" presenting an "unreasonable risk" to customers like plaintiff.

It is on this point that the concurring opinion goes awry. My colleague does not offer any evidence upon which the fact-finder might reasonably conclude that, before the accident occurred, defendant should have realized that the one-inch wire was a dangerous condition presenting an unreasonable risk of harm. Instead, the concurring opinion only points to evidence that one of defendant's employees removed the bin after the accident occurred. That evidence is simply irrelevant to the real question here, whether an unreasonable risk should have been anticipated beforehand. Further, this irrelevant evidence could not be presented to the fact-finder for any consideration whatsoever under the subsequent remedial measure proscription of MRE 407.

Similarly, the concurring opinion misplaces the "risk-utility analysis" that precedents suggest is useful to determine whether the risk of the one-inch wire was unreasonable. I agree that, following the accident, the then-known risk of the one-inch wire outweighed the utility of removing it. But, that has nothing to do with what defendant should have anticipated before the accident occurred, under Justice Cavanagh's formulation. *Williams, supra* at 500.

Certainly, as suggested in the concurring opinion, the arguments I am making here could be presented to the fact-finder, and I would hope that they would be persuasive. Still, I see no need to foist upon defendant the costs of further litigation under the facts presented here and the law applicable to them. Neither should defendant have to risk the possibility of liability being imposed at trial and the costs that would no doubt result in trying to undo such an unfounded result. Although some might disagree, not every personal injury lawsuit that is filed deserves to go to the fact-finder; that is why we have a well-developed body of rules and caselaw allowing summary dispositions.

Finally, as I write this opinion, our state leads the nation in its unemployment rate. I cannot avoid commenting on how the result here will further discourage employers from locating in Michigan. Most employers have premises frequented by invitees of one kind or another. The decision rendered by my colleagues today strips away the minimal protection previously afforded by the Supreme Court precedents already discussed. It foists potential liability upon business invitors for miniscule risks that are only reasonably discoverable after, and because of, an alleged accident.

I would initially conclude that no reasonable fact-finder could find that, before plaintiff Terri Price's alleged accident, the one-inch wire was a dangerous condition presenting an unreasonable risk of harm. Therefore, defendant had no duty to remove that one-inch wire.[1]

Regarding the issue discussed in the lead opinion, I further conclude that the open and obvious danger doctrine would apply to absolve defendant of any liability, even if the one-inch wire was a dangerous condition presenting an unreasonable risk of harm. Photographic evidence of bins similar to the bin that allegedly caused injury to Terri Price shows that the wire composition of the bins is obvious. Terri admitted at her deposition that there was more than one wire sticking out of the bin into which she reached. She testified, in part, "it had these little prongs, and these little prong things were sticking out toward the – you know, like if you were going to the flow of the traffic here, they were sticking out of this corner." Terri testified that the particular wire that caught her pant leg was located at ankle level, about two or three inches above the floor. She claimed that she did not see that wire before she fell, but she did not identify anything that could have blocked her view.

Terri's testimony that she did not see the wire before the alleged accident is irrelevant to whether the danger was open and obvious. *Novotney v Burger King Corp (On Remad)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). Instead, the standard is whether an average person with ordinary intelligence, having casually inspected the premises, in this case the bin with its

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[1] Courts that, like Michigan courts, apply the Restatement approach regularly adopt this analysis with this result. See, e.g., *Campisi v Acme Markets, Inc*, 915 A2d 117, 119-120 (Pa Super, 2006) (affirming a judgment notwithstanding a verdict in favor of a plaintiff, the court reasoned that a blind person, whose cane the plaintiff allegedly tripped over, was not a "harmful condition" on the defendant's premises sufficient to establish any legal duty); *Fredrickson v Bertolino's Tacoma, Inc*, 131 Wash App 183, 188-191; 127 P3d 5 (2006) (affirming a summary judgment granted to a defendant, the court reasoned that the evidence was insufficient to show that the defendant's coffee shop chair, which allegedly broke beneath the plaintiff, posed an unreasonable risk of harm to customers); *CMH Homes, Inc v Daenen*, 15 SW3d 97, 99-103 (Tex, 2000) (overturning a judgment for a plaintiff, the court reasoned that there was insufficient evidence showing that the alleged instability of steps upon which the plaintiff was injured was a danger that the defendant should have known created an unreasonable risk of harm); *Hartung v Maple Investment & Dev Corp*, 243 Ill App 3d 811, 815-817; 612 NE2d 885 (1993) (the court reasoned that a small defect in a privately owned sidewalk did not present an unreasonable risk of harm to invitees and that, therefore, the possessor of the sidewalk could not be liable for an injury resulting from that defect).

protruding wire, would have noticed the danger presented by the wire. *Id.*[2] In other words, Terri was obligated to watch where she was going and be generally aware of her physical environment, to avoid injuries like the one she claims resulted from the one-inch wire. Plaintiffs admit in their brief that Terri "had no reason to casually inspect" the basket, apparently conceding that she did not do so. Further, she admits that "if she had made such an inspection, she would have, or may have seen the wire protruding slightly from the side of the bin."

Viewed in a light most favorable to plaintiffs, the evidence did not create a genuine issue of material fact regarding whether an average person of ordinary intelligence would have been able to discover the danger posed by the protruding wire upon casual inspection of the bin. Because reasonable minds could not differ in finding that the danger was open and obvious, I would conclude that the trial court properly granted summary disposition in favor of defendant with respect to this issue.

/s/ Richard A. Bandstra

[2] *Novotney* and numerous other open and obvious danger precedents are themselves the "caselaw [that] supports the existence of a duty by plaintiff to inspect the bin." See *ante* at 3. (Gleicher, J., concurring).