STATE OF MICHIGAN

COURT OF APPEALS

ALICE L. COLLIER,

Plaintiff-Appellant,

v

DANNY'S MARKETS, INC.,

Defendant-Appellee.

UNPUBLISHED
July 7, 1998

No. 199284
Oakland Circuit Court
LC No. 96-516042 NO

Before: Sawyer, P.J., and Kelly and Doctoroff, JJ.

PER CURIAM.

In this negligence action, plaintiff appeals as of right the order of the trial court granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10).[1] We affirm.

Plaintiff alleges that she sustained an injury on defendant's premises when she "was knocked in the head by a hanging scale" located in the produce section of defendant's premises. Plaintiff argues that defendant's claim that the hanging scale constituted an open and obvious danger is not an absolute defense to her assertion of a duty on behalf of a premise owner to exercise reasonable care to protect invitees. If the risk of harm remains unreasonable despite the obviousness of the harm or the invitee's knowledge of the risk of harm, the invitor may be required to implement reasonable precautions. While we agree with plaintiff's statement of the law, we disagree with regard to its application to the facts in this case.

According to MCR 2.116(C)(10), a party can move for judgment on all of a claim on the grounds that "there is no genuine issue as to material fact, and the moving party is entitled to judgment . . . as a matter of law." An appellate court reviews a trial court's granting of summary disposition de novo on appeal. *Royce v Duthler*, 209 Mich App 682, 688; 531 NW2d 817 (1995). An appellate court considers the same documentary evidence that a trial court must consider, including pleadings, affidavits, depositions, and admissions. *Boumelhem v Bic Corp*, 211 Mich App 175, 178; 535 NW2d 574 (1995). The opposing party has the burden of demonstrating a genuine and material issue of disputed fact. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994). All inferences are drawn in favor of the opposing party and courts should be liberal in finding a genuine issue of material fact.

Bertrand v Alan Ford, Inc, 449 Mich 606, 617-618; 537 NW2d 185 (1995); *Buczkowski v Allstate Ins Co (On Rehearing)*, 198 Mich App 276, 278; 502 NW2d 343 (1993), aff'd 447 Mich 669 (1994).

A cause of action for negligence requires that the plaintiff demonstrate that (1) the defendant owed a duty to the plaintiff; (2) the defendant breached the duty; (3) the defendant's breach of the duty proximately caused the plaintiff's injuries; and (4) the plaintiff suffered damages. *Richardson v Michigan Humane Society*, 221 Mich App 526, 528; 561 NW2d 873 (1997). Social policy imposes a duty on possessors of land to protect invitees based on the special relationship that exists between them because an invitor is in a better position to control the matters affecting safety. *Bertrand*, *supra* at 609. Thus, an invitor must exercise reasonable care to protect invitees from an unreasonable risk of harm arising out of a dangerous land condition. *Id.* Traditionally, an invitor breaches that duty when he fails to warn an invitee of the condition, negligently maintains the land, or has a defective physical structure on the land. *Id.* at 610. However, there is no absolute duty to warn invitees of known or obvious dangers. *Riddle v McLouth Steel Products*, 440 Mich 85, 97; 485 NW2d 676 (1992). With regard to the failure to warn, the scope of the duty to protect invitees from an unreasonable risk of harm arising out of a dangerous land condition may be limited where the condition is open and obvious. *Bertrand*, *supra* at 610.

Generally, if an invitee should have discovered a dangerous condition and realized its danger, then the open and obvious doctrine relieves the invitor of liability. *Id.* at 611. Whether a danger is open and obvious depends upon whether it is reasonable to expect that an average user with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475, 499 NW2d 379 (1993). Where no reasonable juror could conclude contrary to the fact that the danger posed by a condition was open and obvious, a plaintiff cannot establish a jury submissible claim on a failure to warn theory. *Bertrand*, *supra* at 623.

According to defendant's store manager's affidavit, at the time of the incident, the scale hung at a level of fifty-four inches or four feet five inches from the floor, measuring forty-three inches around and thirty-eight inches long (from the top of the scale to the bottom of the basket). Plaintiff's deposition testimony described the scale as being located in the center of an eight- to ten-foot wide aisle. The description of the scale by plaintiff, along with the actual dimensions furnished by defendant, suggests that an average user with ordinary intelligence would have discovered the danger of hitting his head on the scale based on casual inspection.

However, plaintiff has correctly indicated that the open and obvious doctrine does not absolve a premise owner of liability under some circumstances. If the risk of harm remains unreasonable despite the invitee's knowledge or despite the obviousness of the dangerous condition, then the invitor may still be required to undertake reasonable precautions. *Bertrand*, *supra* at 611. An open and obvious condition that requires a premise owner to take reasonable precautions, without the obligation of warning an invitee, requires a plaintiff to show "special aspects" of that condition such as its "character, location or surrounding circumstances" making the risk of harm unreasonable. *Bertrand*, *supra* at 606, 614, 617. However, an injured plaintiff's mere failure to observe an open and obvious condition, or a long-standing awareness of the special conditions, will not give rise to this Court's finding that a risk of

harm remains unreasonable. *Singerman v Municipal Service Bureau, Inc*, 455 Mich 135, 144; 565 NW2d 383 (1997).

Plaintiff argues that defendant knew the hanging scale was in an area where invitees would traverse while distracted with examining produce bins displayed on the floor during the remodeling of its premises, and, thus, those special circumstances made the risk of harm unreasonable. However, despite plaintiff's contentions that she failed to see the scale or that the alleged remodeling of the store impaired her ability to observe the scale on premises in which she attended frequently, we find that these circumstances or aspects of the premises did not make the risk of harm unreasonable with regard to plaintiff despite the open and obvious nature of the hanging scale.

Plaintiff admitted that she regularly shopped at Danny's, that she had been in the store several days prior to the accident, that she had observed the scale hanging out in the open at that time, that the scale was large and visible, that she was aware of the presence of the scale on the date of the incident and question, and that the scale was hanging at eye level and that nothing obstructed her view of the scale. Under these circumstances, the trial court did not err in granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10).

Affirmed.

/s/ David H. Sawyer
/s/ Michael J. Kelly
/s/ Martin M. Doctoroff

[1] The trial court's order stated that it granted summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). Because the trial court considered facts outside of the pleadings, this Court undertakes its analysis only with regard to MCR 2.116(C)(10). See *Espinoza v Thomas*, 189 Mich App 110, 114-115; 472 NW2d 16 (1991).