STATE OF MICHIGAN

COURT OF APPEALS

JILL SMITH and BARRY SMITH, Plaintiffs-Appellees, v HOME DEPOT U.S.A., INC., Defendant-Appellant.	UNPUBLISHED March 7, 2000 No. 207277 Oakland Circuit Court LC No. 96-529103-NO

Before: Whitbeck, P.J., and Saad and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from an order of judgment in favor of plaintiffs, claiming that the trial court erred in denying defendant's motions for summary disposition and directed verdict, entering judgment in favor of plaintiffs and awarding excessive damages. We disagree and affirm.

In this premises liability case, plaintiff[1] filed a lawsuit against defendant to recover damages related to an injury she sustained to her right ring finger while shopping in defendant's store.[2] Plaintiff injured her finger when she reached above her head, grasped the plastic binding around a box of ceramic tile and pulled the box forward to remove it from the shelf, at which time the box fell on her hand.

Defendant argues that the trial court erred in denying its motion for summary disposition under MCR 2.116(C)(10) and its motion for directed verdict because the risk of harm posed by the box of ceramic tile was open and obvious, did not pose an unreasonable risk of harm, and plaintiff herself proximately caused the accident. Here, the box of ceramic tile was an open and obvious danger, but defendant was not entitled to summary disposition and/or directed verdict because the situation posed an unreasonable risk of harm and because a question existed as to who proximately caused the injury.

This Court reviews decisions on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Motions under MCR 2.116(C)(10) test the factual support of the plaintiff's claim. *Id.* The court considers the affidavits, pleadings, depositions, admissions, and other evidence submitted to determine whether a genuine issue of any material fact exists to warrant a trial. *Id.* Both this Court and the trial court must resolve all reasonable

inferences in the nonmoving party's favor. *Bertrand v Allan Ford*, 449 Mich 606, 617-618; 537 NW2d 185 (1995).

We also review de novo a trial court's decision on a motion for a directed verdict. *Braun v York Properties, Inc*, 230 Mich App 138, 141; 583 NW2d 503 (1998). We consider the evidence presented at trial in a light most favorable to the nonmoving party to ascertain whether the plaintiff established a prima facie case. *Id.* The court should grant a directed verdict only if reasonable jurors could not reach different conclusions. *Id.*

Plaintiff was an invitee on defendant's premises because she and her companions entered defendant's store to conduct business with defendant. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 90 n 4; 485 NW2d 676 (1992); *Butler v Ramco-Gershenson, Inc*, 214 Mich App 521, 532; 542 NW2d 912 (1995). With regard to the duty owed to a business invitee, such as plaintiff, our Supreme Court has stated:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger. [*Riddle, supra* at 93, quoting 2 Restatement Torts, 2d, § 343.]

In determining the duty owed a business invitee, the Court also stated, "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, supra* at 96. In a later case, our Supreme Court explained:

> [I]f the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor is required to undertake reasonable precautions. The issue then becomes the standard of care and is for the jury to decide. [*Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995); footnote omitted.]

This Court has also addressed the duty owed to a business invitee, noting that a landowner does not have a duty to warn invitees of open and obvious dangers. *Hughes v PMG Building, Inc*, 227 Mich App 1, 10; 574 NW2d 691 (1997). "Whether a danger is open and obvious depends upon whether it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection." *Id.* Although a land owner is not required to make its premises "foolproof," *Hottmann v Hottmann*, 226 Mich App 171, 176; 572 NW2d 259 (1997); *Spagnuolo v Rudds # 2, Inc*, 221 Mich App 358, 362; 561 NW2d 500 (1997), he or she "has a duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition that the owner knows or should know the invitees will not discover or protect themselves against." *Hughes, supra* at 9. This Court further observed:

> [E]ven if a danger is open and obvious, a possessor of land may still have a duty to protect invitees against foreseeably dangerous conditions. . . . [E]ven though there may not be an absolute obligation to provide a *warning* [of open and obvious dangers], this rule does not relieve the invitor from his duty to exercise reasonable care to protect his invitees against known or discoverable dangerous conditions. The rationale behind this rule is that liability for injuries incurred on defectively maintained premises should rest upon the party who is in control or possession of the premises, and, thus, is best able to prevent the injury. [*Id.* at 10-11; citations omitted.]

Once the existence of a duty towards the plaintiff is established, the reasonableness of the defendant's conduct is a question for the jury. *Riddle, supra* at 96-97.

Here, plaintiff says that she injured her finger when she reached above her head, grasped the plastic binding around the box of tile and pulled the box forward to remove it from the shelf, at which time the box fell on her hand. A box of ceramic tile stacked vertically on a shelf almost six feet from the floor is an open and obvious danger. Arguably, however, displaying a box of heavy tiles, for self-service sale, on its vertical end at a height of nearly six feet from the floor, creates a condition that may cause an unreasonable risk of harm to reasonably prudent persons. In a self-serve setting, an invitor arguably should anticipate the harm or danger that such a condition may pose despite knowledge of it on behalf of the invitee. If an unreasonable risk exists, the invitor must exercise reasonable care to protect invitees. *Riddle, supra*; *Hughes, supra*. Because whether the condition poses an unreasonable risk of harm and what constitutes reasonable care are matters for the trier-of-fact, *Bertrand, supra* at 617; *Riddle, supra,* the trial court did not err in denying summary disposition and directed verdict.

Further, defendant's argument that the trial court erred in denying defendant's motion for summary disposition because plaintiff proximately caused the box of tiles to fall on her finger is without merit. To show proximate cause, a plaintiff must prove that the injury was a probable, reasonably anticipated, and natural result of the defendant's negligence. *Allen v Owens-Corning Fiberglas Corp,* 225 Mich App 397, 401; 571 NW2d 530 (1997). "There may be more than one proximate cause of an injury. . . . [A] defendant cannot escape liability for its negligent conduct simply because the negligence of others may also have contributed to the injury suffered by a plaintiff." *Id.* 401-402. Generally, proximate cause is a factual issue for the trier of fact to decide; however, if reasonable minds could not differ with regard to the proximate cause of a plaintiff's injury, the issue is one of law for the trial court. *Transportation Dep't v Christensen*, 229 Mich App 417, 424; 581 NW2d 807 (1998).

Here, plaintiff alleged that the heavy box of ceramic tile, situated in a vertical manner on a shelf over five feet five inches from the ground, without warning or notice with regard to the weight of the box, constituted a dangerous and defective condition which proximately caused plaintiff's broken finger. Plaintiff set forth sufficient facts for a reasonable trier of fact to conclude that defendant's negligent conduct was the proximate cause of her injury where it was foreseeable that customers, in this self-serve setting, would attempt to retrieve a box of tile. Because reasonable minds could differ with regard to the proximate cause of plaintiff's injury, the trial court properly denied defendant's motion for summary disposition on this basis.

Finally, defendant argues that the trial court erred in awarding excessive damages to plaintiffs. This Court will not overturn on appeal a trial court's determination of damages in a bench trial unless the result is clearly erroneous. *In regard Rosati Trust*, 177 Mich App 1, 6; 441 NW2d 30 (1989). A trial court's decision is clearly erroneous when the reviewing court is left with a firm and definite conviction that a mistake has been made. *Id.*

First, defendant asserts that the award was excessive because plaintiff "merely" suffered a broken finger. Defendant suggests that plaintiff's damages should be reduced because she did not immediately seek medical attention, there was not much that the medical profession could do to help her, she had no surgery or physical therapy, and she missed no work. However, there is ample support in the record for the trial court's determination. The record illustrates a well-reasoned assessment of damages, including: review of plaintiff's medical records; notation of the permanent nature of plaintiff's injury, including deformities, degenerative changes in the finger, and plaintiff's continued pain; indication of plaintiff's difficulties in performing work and with her personal hygiene; and observation of the disturbance of plaintiff's recreational habits. Further, the trial court noted plaintiff's credibility, indicating that plaintiff did not impress the court as a malingerer or one who tried to take advantage of the situation. No clear error is present.

Next, defendant argues that the record does not support the trial court's award of $2,500 to plaintiff's husband on his loss of consortium claim. A spouse has the right to recover from a tortfeasor for loss of consortium as a consequence of the injuries suffered by the other spouse. *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502, 504; 309 NW2d 163 (1981). According to our Supreme Court, consortium includes "society, companionship, service, and all other incidents of the marriage relationship." *Id.*, quoting *Washington v Jones*, 386 Mich 466, 472; 192 NW2d 234 (1971). In the present case, with regard to plaintiff's husband's claim for loss of consortium, the trial court noted the testimony of plaintiff's husband, which included information about the types of things that he has had to undertake, the change in his quality of life in terms of having to do personal things for plaintiff, and the inability to play tennis and other recreational activities in which they had participated. Again, no clear error is present.

Finally, defendant claims that the percentage of comparative negligence attributed to plaintiff, i.e., ten percent, is in error because plaintiff admitted that she "lost control of the box." This Court has stated that "there is no magical formula for apportioning negligence." *Scott v Allen Bradley Co*, 139 Mich App 665, 673; 362 NW2d 734 (1984). Here, plaintiff testified that she did not know how much boxes of ceramic tile weighed, but estimated about five to ten pounds; that she had never before touched a ceramic tile and had not planned on using a shopping cart, but planned to carry the tile to the cash register; and that she attempted to get assistance from a store employee, but failed to locate such assistance. The trial court apportioned plaintiff's comparative negligence at ten percent primarily because, although plaintiff made a reasonable effort to find someone to help, she perhaps could have made a greater effort. The trial court's apportionment is supported by the record and is not clearly erroneous. In summary, because this

Court is not left with a firm and definite conviction that the trial court erred in assessing damages, no clear error exists.

Affirmed.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra

[1] Because Barry Smith's claim is derivative, "plaintiff" only refers to Jill Smith.

[2] The injury occurred in a Home Depot store in Arizona, when plaintiff was visiting relatives in that state, but she received medical treatment for the injury after she returned to Michigan.