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UNPUBLISHED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.

SAAD, J. (dissenting).

I respectfully dissent. Plaintiff's evidence, at both the summary disposition and trial stage, failed to establish defendant's premise liability. The evidence did not allow a trier of fact to conclude that the box of tiles constituted an unreasonable risk of harm to plaintiff. On the contrary, the evidence established that any risk of harm posed by the box of ceramic tile was open and obvious and did not pose an unreasonable risk of harm. See *Hughes v PMG Building*, 227 Mich App 1, 10; 574 NW2d 691 (1997); *Singerman v Municipal Service Bureau, Inc*, 455 Mich 135, 142-143; 565 NW2d 383 (1997).

I do not believe that the vertical placement of the box of ceramic tiles presented a dangerous condition or posed an unreasonable risk of harm. Any risk should have been open and obvious to plaintiff and other shoppers. It is reasonable to expect that the average person will realize that boxes of ceramic tiles are heavy, and will accordingly make sensible judgments about her ability to remove a heavy object from a shelf situated above her head. Plaintiff testified that Home Depot is a warehouse-style store that sells building supplies and hardware. The style and arrangement of defendant's store and the manner of stacking the merchandise makes it clear to a reasonable shopper that many items are heavy, stacked high, and should not be pulled off the shelves without assistance. In fact, plaintiff admitted she did not select one of the horizontally-stacked tile boxes because they were too heavy and too high for her to reach. A reasonable shopper should recognize that the merchandise might be too heavy or awkward for some people to handle, and understand that she may need assistance when purchasing certain items. Indeed, plaintiff admitted that she knew defendant had a customer service desk, but that she did not go there for help, and that she quit looking for assistance after checking only

three nearby aisles for available store personnel. Plaintiff created her own hazard by attempting to remove merchandise from a display when she should have known of the risk, and defendant cannot be held liable. See *Foodmax of Georgia v Fleming*, 219 Ga App 469; 465 SE2d 489 (1995) (appellate court reversed trial court's denial of defendant's motion for summary judgment where 5' 3" tall plaintiff struck by can of tomatoes she removed from 6' display stack) and *Lazzara v Marc Glassman, Inc*, 107 Ohio App 3d 163; 667 NE2d 1275 (1995) (trial court affirmed summary judgment for defendant where plaintiff removed box of toilet paper rolls from middle of stack, causing higher stacked boxes to fall on her).

The trial court should have granted defendant's motions for summary disposition and directed verdict on the ground that plaintiff failed to establish an unreasonably dangerous condition. I would therefore reverse the verdict for plaintiff and enter judgment for defendant.

/s/ Henry William Saad