STATE OF MICHIGAN

COURT OF APPEALS

DONNA M. RILEY,

Plaintiff-Appellant,

v

HOME DEPOT U.S.A., INC.,

Defendant-Appellee.

UNPUBLISHED
August 12, 2003

No. 239382
Wayne Circuit Court
LC No. 01-101424-NO

Before: Donofrio, P.J., and Bandstra and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendant in this premises liability action. We affirm.

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition and in denying summary disposition for plaintiff. We disagree.

"A trial court's grant or denial of summary disposition under MCR 2.116(C)(10) is reviewed de novo on appeal." *Liberty Mutual Ins Co v Michigan Catastrophic Claims Ass'n*, 248 Mich App 35, 40; 638 NW2d 155 (2001). "A motion for summary disposition tests whether there is factual support for a claim." *Universal Underwriters Group v Allstate Ins Co*, 246 Mich App 713, 720; 635 NW2d 52 (2001). "Affidavits, pleadings, depositions, admissions, and documentary evidence are considered in reviewing a motion for summary disposition pursuant to MCR 2.116(C)(10), and the evidence is viewed 'in the light most favorable to the party opposing the motion.'" *Id*. "Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." *Id*. The trial court appropriately grants summary disposition to the opposing party under MCR 2.116(I)(2) when it appears to the court that the opposing party, rather than the moving party, is entitled to judgment as a matter of law. *Sharper Image v Dep't of Treasury*, 216 Mich App 698, 701; 550 NW2d 596 (1996).

To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). "The duty that a possessor of land owes to another person who is on the land depends on the latter person's status." *Hampton v Waste Mgmt of Michigan, Inc*, 236 Mich App 598, 603; 601 NW2d 172 (1999). "The status of a person on land that person does not possess will be one of the

following: (1) a trespasser, (2) a licensee, or (3) an invitee." *Id*. An invitee is one who enters the land of another for a commercial purpose on an invitation that carries with it an implication that reasonable care has been used to prepare the premises and to make them safe. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000).

Here, plaintiff was an invitee because she was on defendant's premises that was held open for commercial purpose. "In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). "With the axiom being that the duty is to protect invitees from *unreasonable* risks of harm, the underlying principle is that even though invitors have a duty to exercise reasonable care in protecting their invitees, they are not absolute insurers of the safety of their invitees." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995). The duty does not generally encompass removal of open and obvious dangers. *Lugo, supra* at 516. The question of whether a condition is open and obvious depends on if it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection. *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 10; 575 NW2d 591 (1997). "[O]nly those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove the condition from the open and obvious danger doctrine." *Lugo, supra*, 464 Mich 519. The *Lugo* Court illustrated that special aspects of a condition would include an unguarded thirty foot deep pit in the middle of a parking lot and standing water at the only exit of a commercial building resulting in an unavoidable condition because no alternative route is available. *Id.* at 518, 520.

Plaintiff argues that reasonable minds could differ on whether defendant negligently created a dangerous condition by loading the backerboard onto plaintiff's shopping cart, rather than using a lumber cart. We find, however, that reasonable minds could not differ that the open and obvious risk associated with the loading backerboard onto plaintiff's shopping cart was not unreasonably dangerous. The backerboard, measuring three-feet-by-five-feet, and weighing fifteen pounds, made plaintiff's shopping cart "wobbly." Pushing a wobbly shopping cart is a condition that, upon casual inspection, an average person of ordinary intelligence would discover any associated danger. Plaintiff testified that she had no problems pushing the cart until she decided it was necessary to remove the backerboard from the cart in order to get around a ladder partially blocking the aisle. Up to that point, the backerboard had remained in place on plaintiff's shopping cart. Moreover, plaintiff could have avoided going around the ladder altogether had she chosen to go down another aisle, rather than the one with the ladder, in order to avoid other customers. When plaintiff did remove the backerboard on her own, without seeking assistance from a store employee, she injured herself while trying to reposition the backerboard onto her shopping cart. The injury did not occur because of any unreasonable danger created by defendant's actions, or even because plaintiff tripped on something, but merely because plaintiff lost her balance. Therefore, we find that plaintiff has failed to establish a question of fact regarding whether defendant negligently created an unreasonably dangerous condition. *Lugo, supra* at 519.

Plaintiff further argues that the trial court erred in concluding that defendant's placing the backerboard onto plaintiff's shopping cart was not a proximate cause of plaintiff's injuries. "Proximate cause means such cause as operates to produce particular consequences without the

intervention of any independent, unforeseen cause, without which the injuries would not have occurred." *Babula v Robertson*, 212 Mich App 45, 54; 536 NW2d 834 (1995). Because the trial court concluded that defendant did not breach its duty of care to plaintiff in placing the backerboard onto her shopping cart, it did not err in concluding that defendant's action was not a proximate cause of plaintiff's injuries. Even if defendant had breached its duty of care to plaintiff, plaintiff's decision to remove the backerboard from her shopping cart was an intervening, independent cause of her injuries.

Plaintiff also argues that the trial court erred by applying contributory negligence instead of comparative negligence in its analysis. "In *Placek v Sterling Heights*, 405 Mich 638; 275 NW2d 511 (1979), our Supreme Court adopted a pure form of comparative negligence, under which a plaintiff's recovery of damages is reduced to the extent that plaintiff's negligence contributed to the injury." *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 80; 618 NW2d 66 (2000). With contributory negligence, a plaintiff's recovery of damages is barred entirely if plaintiff's own negligence contributed to the injury. *Placek*, *supra* at 650 fn 1. The trial court did not apply the doctrine of contributory negligence in granting defendant's motion for summary disposition, but rather, found that plaintiff had failed to establish a question of fact regarding whether defendant negligently created an unreasonably dangerous condition.

Furthermore, based on the above analysis, the trial court did not err in denying summary disposition for plaintiff under MCR 2.116(I)(2). Plaintiff, as the opposing party, was not entitled to judgment as a matter of law. *Sharper Image*, *supra* at 701. Plaintiff failed to establish a question of fact regarding whether defendant negligently created an unreasonably dangerous condition. *Lugo*, *supra* at 519.

Affirmed.

/s/ Pat M. Donofrio
/s/ Richard A. Bandstra
/s/ Peter D. O'Connell