STATE OF MICHIGAN

COURT OF APPEALS

ALBERT PETER SCHUMP,

Plaintiff-Appellant,

v

THE HOME DEPOT, USA, INC.,

Defendant-Appellee.

UNPUBLISHED
October 23, 2008

No. 279256
Oakland Circuit Court
LC No. 2006-073663-NO

Before: Servitto, P.J., and Donofrio and Fort Hood, JJ.

MEMORANDUM.

Plaintiff appeals as of right an order granting summary disposition to defendant in this premises liability action. We affirm. This case has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff tripped over a two-by-four board protruding from beneath a hot tub on the concrete entryway to the Home Depot store located in the city of Southfield, falling and sustaining injuries to his back. On appeal, plaintiff alleges that the trial court erred in applying the open and obvious doctrine when various factors caused the condition to be "invisible" and the credibility of plaintiff's testimony presented a factual issue. We disagree.

"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, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). The duty generally does not include removing open and obvious dangers unless the premises owner should anticipate that special aspects of the condition make even an open and obvious risk unreasonably dangerous. *Id*. at 517. Whether a hazardous condition is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger and risk presented upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). The determination depends on the characteristics of a reasonably prudent person, and not on the characteristics of a specific plaintiff. See *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329 n 10; 683 NW2d 573 (2004). An ever-changing and uncorroborated account is nothing more than speculation and conjecture and does not demonstrate that a defendant knew or had reason to know of the existence of a dangerous condition. *D'Ambrosio v McCready*, 225 Mich App 90, 96; 570 NW2d 797 (1997). In Michigan, it is the overriding public policy to encourage people to take

reasonable care for their own safety and watch where they are walking. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 616-617; 537 NW2d 185 (1995).

In the present case, plaintiff alleges that inadequate lighting, shadowing of the hot tub, night darkness and harsh weather, lack of color differentiation, and a slight protrusion precluded the condition from being characterized as open and obvious. The determination of an open and obvious condition is not premised on individual factors, but rather based on whether a person of ordinary intelligence would have discovered the danger upon casual inspection. Review of the record reveals that an ordinary person upon casual inspection would have discovered the danger. Plaintiff failed to demonstrate that the asserted conditions would have precluded a person of ordinary intelligence from discovering the condition. Accordingly, the trial court did not err in granting summary disposition.

Affirmed.

/s/ Deborah A. Servitto
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood