STATE OF MICHIGAN

COURT OF APPEALS

KATHY SCOTT,

Plaintiff-Appellant,

v

KROGER and THE KROGER COMPANY ,

Defendants-Appellees.

UNPUBLISHED
August 12, 2010

No. 290696
Wayne Circuit Court
LC No. 08-122918-NO

Before: WILDER, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

In this negligence and premises liability action, plaintiff appeals the trial court's grant of summary disposition to defendant pursuant to MCR 2.116(C)(10). For the reasons set forth below, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

We review de novo an order granting a motion for summary disposition. *Spiek v Michigan Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a motion under MCR 2.116(C)(10), we consider the evidence in a light most favorable to the non-moving party. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). The moving party is entitled to judgment as a matter of law if no genuine issue of material fact exists. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001).

Plaintiff alleges that she slipped and fell on a puddle of water while shopping at defendant's store. She argues that the trial court erred when it granted summary disposition to defendant because she claims the water was nearly invisible and there was no sign or other indication that the floor was wet.

Under open and obvious doctrine, when a plaintiff is a business invitee, the premises owner has a duty to use reasonable care to protect the plaintiff from dangerous conditions. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 612-613; 537 NW2d 185 (1995). "However, 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." *Id.* To determine whether a danger is open and obvious, the courts consider "whether an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection." *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002). Courts do

not consider whether a specific plaintiff knew or should have known about the dangerous condition, but whether the danger would be foreseeable to a reasonable person in the plaintiff's position. *Id.*

Here, plaintiff's own deposition testimony established that, upon casual inspection, a reasonable person in her position would have seen the water. Plaintiff admitted that she was able to see the water when she was on the floor and after she stood up. Further, plaintiff testified that she did not tell the manager where the spill was located because she thought he had seen the water. On the basis of plaintiff's testimony, the water was not invisible and could be seen upon casual inspection. Accordingly, the trial court correctly held that the condition was open and obvious. See *Joyce*, 249 Mich App at 238.

Plaintiff argues that, if the water was open and obvious, a nearby seafood display constituted a "special aspect" that created an unreasonable risk of harm because it diverted her attention from the water on the floor.

If a court finds that the condition is open and obvious, it must then consider whether there are any special aspects that create an unreasonable risk of harm despite the condition being open and obvious. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001). "[I]f special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Id.* Therefore, the inquiry in such cases is "whether the 'special aspect' of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability." *Id.* at 517-518. To be a special aspect, the harm must be "effectively unavoidable" or constitute "an unreasonably high risk of severe harm." *Id.* at 518. "However, the risk must be more than merely imaginable or premised on a plaintiff's own idiosyncrasies." *Robertson v Blue Water Oil Co*, 268 Mich App 588, 593; 708 NW2d 749 (2005). To determine whether a special aspect exists, the court considers the surrounding conditions, the character, and the location of the condition in question. *Bertrand*, 449 Mich at 617.

Here, no special aspect existed. A small, visible puddle of water in front of a seafood display case does not yield a "uniquely high likelihood of harm or severity of harm" and no evidence indicates that the water on the floor was "effectively unavoidable." *Lugo*, 464 Mich at 517-518. Plaintiff stated that she was not looking where she was walking when she fell and, again, the water was visible upon casual inspection. Accordingly, evidence showed that the risk was avoidable if plaintiff had simply looked in front of her. The trial court did not err when it granted defendants' motion for summary disposition.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Henry William Saad