STATE OF MICHIGAN

COURT OF APPEALS

STEVEN LISON and CAROL LISON, Plaintiffs-Appellants,	UNPUBLISHED February 27, 2018
v	No. 337006 Kent Circuit Court
COSTCO WHOLESALE CORPORATION, Defendant-Appellee.	LC No. 16-000830-NO

Before: MURPHY, P.J., and O'CONNELL and K. F. KELLY, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition in favor of defendant Costco Wholesale Corporation pursuant to MCR 2.116(C)(10) in this premises liability action. We affirm.

Plaintiff Carol Lison (Lison) was shopping at Costco when she headed to the rear of the store to get paper products. She stopped her shopping cart in front of a pallet stacked with large packages of toilet paper. The pallet was empty in the front, so Lison walked around the right edge of the pallet to reach a package on the back of the pallet. Lison acknowledged that she saw the pallet, including the corner that she later caught her foot on, and navigated around it to retrieve the toilet paper. The package was large, so when she was carrying the package, Lison could no longer see her feet or the ground. As she walked back toward her cart with the package in her arms, Lison thought that she had cleared the pallet, but her foot got caught on the corner of the pallet. She fell forward on her right side, fracturing her knee and foot. Plaintiffs then filed this action, seeking recovery under theories of premises liability, ordinary negligence, and loss of consortium. Subsequently, the trial court granted Costco's motion for summary disposition, agreeing with its arguments that (1) plaintiffs' claim sounded in premises liability, so the ordinary negligence claim was subject to dismissal; (2) the open and obvious danger doctrine precluded recovery on the premises liability claim; and that, therefore, (3) the loss of consortium claim necessarily failed. Plaintiffs now appeal as of right.

We review de novo a trial court's ruling on a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). Finally, in regard to the principles governing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court in *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013), observed:

> In general, MCR 2.116(C)(10) provides for summary disposition when there is no genuine issue regarding any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. A motion brought under MCR 2.116(C)(10) tests the factual support for a party's claim. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). [Citations and quotation marks omitted.]

"It is well settled in Michigan that a premises owner must maintain his or her property in a reasonably safe condition and has a duty to exercise due care to protect invitees from conditions that might result in injury." *Riddle v McLouth Steel Prods Corp*, 440 Mich 85, 90; 485 NW2d 676 (1992). The *Riddle* Court further explained:

> A negligence action may only be maintained if a legal duty exists which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm. If the plaintiff is a business invitee, the premises owner has a duty to exercise due care to protect the invitee from dangerous conditions. 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.* at 96 (citations omitted; emphasis added).]

This case does not technically give rise to the open and obvious danger doctrine; rather, the existence of the alleged hazard was actually *known* by Lison, thereby eliminating Costco's duty to protect or warn her. Lison was fully aware of the pallet's presence on the floor. Although she could no longer see the pallet once she had the bulky package of toilet paper in her arms, Lison knew it was there, stating in her deposition that she thought she had cleared it but just miscalculated. And we find no basis to conclude that Costco should have anticipated the harm despite Lison's knowledge. Moreover, the pallet hazard was clearly open and obvious, and no special aspects existed to take the case outside the doctrine. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001). Plaintiffs' arguments to the contrary are simply unavailing.

Plaintiffs next contend that the trial court erred in summarily dismissing the ordinary negligence claim, where Costco breached its duty to act reasonably by placing large packages of toilet paper on top of a pallet that presented a known tripping hazard. "Michigan law distinguishes between claims arising from ordinary negligence and claims premised on a condition of the land." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 692; 822

NW2d 254 (2012). "If the plaintiff's injury arose from an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence; this is true even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury." *Id*. Here, Lison's injuries resulted from tripping on the pallet – a condition on the premises. Accordingly, the ordinary negligence claim was properly dismissed. Finally, given our rulings, the loss of consortium claim necessarily fails. See *Estate of Eddington v Eppert Oil Co*, 441 Mich 200, 230; 490 NW2d 872 (1992).

Affirmed. Having fully prevailed on appeal, Costco is awarded taxable costs under MCR 7.219.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly