STATE OF MICHIGAN

COURT OF APPEALS

LOIS LAFONTAINE, Plaintiff-Appellant,	UNPUBLISHED December 22, 2011
v	No. 300306 Oakland Circuit Court
BIG LOTS STORES, INC., d/b/a BIG LOTS STORE III, BIG LOTS and BIG LOTS FURNITURE, Defendant-Appellee.	LC No. 2009-102594-NO

Before: SAAD, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff was shopping at defendant's store, which she described as very brightly lit. She walked down an aisle toward the back of the store and turned at the end of the aisle, whereupon she tripped over a three-foot-square wheeled wooden pallet that was right around the corner. The pallet protruded about three feet into the adjacent aisle, taking up approximately half of it. The color of the pallet contrasted with the color of the floor.[1] According to plaintiff, she did not see the pallet until after it hit her shin, and she testified that she could have walked around it had she seen it. Plaintiff jumped onto the pallet with both feet after she struck the pallet, and the pallet then rolled out from under her. She fell to the floor and was injured.[2] The trial court

[1] Plaintiff testified that the pallet was light brown and the floor was gray. However, she also identified a photograph of another pallet in the same store as looking like the one she tripped over other than being "maybe a bit more rectangular." While a color copy of that photograph has not been provided to us, the grayscale photograph unambiguously shows the pallet as starkly contrasting with the floor and being much darker; the trial court indicated that the pallet was gray and the floor was off-white, and plaintiff does not appear to contest that finding.

[2] Defendant disputes whether plaintiff was actually injured, but for the purposes of the motion and for this appeal, we presume she was.

found that plaintiff's claim sounded in premises liability, however she characterized it in her complaint, and that the pallet was open and obvious and had no "special aspects." It therefore granted summary disposition in favor of defendant.

This Court reviews a motion for summary disposition pursuant to MCR 2.116(C)(10) de novo, examining all submitted evidence and legitimate inferences there from in the light most favorable to the nonmoving party to determine whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. *Coblentz v City of Novi*, 475 Mich 558, 567-568; 719 NW2d 73 (2006). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

"In a premises liability action, a plaintiff must prove (1) that the defendant owed a duty to the plaintiff, (2) that the defendant breached the duty, (3) that the defendant's breach of the duty caused the plaintiff's injuries, and (4) that the plaintiff suffered damages." *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007). It is undisputed that plaintiff was a business invitee, so defendant owed her a duty to exercise due care to protect her from dangerous conditions on the premises. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001); *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). That duty does not, however, extend to any dangers that are open and obvious, unless some "special aspects" of the condition make it effectively unavoidable or pose an unreasonably high risk of severe harm despite it being open and obvious. *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 478; 760 NW2d 287 (2008).

The gravamen of plaintiff's argument is that she provided unrebutted testimony that she did not see the pallet and could not have seen the pallet; therefore, she contends, the pallet could not have been open and obvious. However, openness and obviousness is evaluated from an objective standard, "and the inquiry is whether a reasonable person in the plaintiff's position would have foreseen the danger, not whether the particular plaintiff knew or should have known that the condition was hazardous." *Slaughter*, 281 Mich App at 479. Plaintiff's testimony, although unrebutted and viewed in the light most favorable to her, does not establish a genuine question of fact whether an average person of ordinary intelligence and perceptiveness would, in the exercise of ordinary care, have discovered and avoided the pallet.

Plaintiff describes the pallet as "hidden" and "camouflaged." The available evidence contradicts these descriptors. In fact, it is known that the pallet contrasted with the floor and the area was brightly illuminated. The pallet was merely around a corner. Drawing an inference favorable to plaintiff, we presume that the shelving making up the aisles was stocked in such a way that they could not be seen through. However, we agree with defendant's argument that it is impossible for the pallet not to have been visible to a person approaching the end of the aisle before reaching the pallet itself. The pallet stuck out three feet—halfway across the intersecting aisle. If the pallet was directly at the corner of the intersection, some of it would have been visible before reaching the corner itself. If the pallet was far enough back from the corner that it could not be seen prior to turning, then it would have been far enough away for a person to see it and stop after turning. There were no other obstructions to viewing it, nor would it have in any way been indistinguishable from its background. In short, the only possible way a reasonable

person would fail to have noticed the pallet is that the person was not exercising ordinary care. And because plaintiff conceded that she could easily have avoided the pallet if she had seen it, there are no "special aspects" to the situation.

Plaintiff alternatively contends that the open and obvious doctrine does not apply to her cause of action because she asserted that her injuries were caused by the active negligence of defendant's employees. We disagree.

A plaintiff may pursue an ordinary negligence claim against a landowner for the landowner's conduct on the landowner's premises. *Laier v Kitchen*, 266 Mich App 482, 491-493; 702 NW2d 199 (2005). However, if the injury is caused by a condition of the premises rather than by the acts of the landowner, the claim sounds in premises liability. *Kachudas v Invaders Self Auto Wash, Inc*, 486 Mich 913, 914; 781 NW2d 806 (2010); *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001). We look beyond any procedural labels to determine the nature of the action by reviewing the claim as a whole. *Simmons v Apex Drug Stores, Inc*, 201 Mich App 250, 253; 506 NW2d 562 (1993); *MacDonald v Barbarotto*, 161 Mich App 542, 547; 411 NW2d 747 (1987). The gravamen of plaintiff's action here is that the premises were unsafe because of the pallet, and she was injured because of the unsafe condition of the premises. The trial court correctly found that this case sounds in premises liability.

Affirmed.

/s/ Henry William Saad
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause