STATE OF MICHIGAN

COURT OF APPEALS

CINDY RANDOLPH and TIMOTHY RANDOLPH,

Plaintiffs-Appellants,

v

D & W FOOD CENTERS, INC.,

Defendant-Appellee.

UNPUBLISHED
November 5, 1996

No. 187694
LC No. 94-000643

Before: Doctoroff, C.J., and Hood and Bandstra, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's grant of summary disposition in favor of defendant. We affirm.

Plaintiffs filed a premises liability action against defendant arising from plaintiff Cindy Randolph's trip and fall accident at defendant's grocery store when she stumbled over a produce tub that defendant had placed near a checkout lane to catch water that was leaking through the roof. The trial court granted defendant's motion for summary disposition, based on MCR 2.116 (C)(10), finding that the tub was an open and obvious condition.

Plaintiffs claim that the trial court erred in finding the tub to be an open and obvious condition. We disagree.

We review rulings on motions for summary disposition de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). A premises owner has a duty to maintain his premises in a reasonably safe condition and to exercise care to protect invitees from potentially harmful conditions. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 90; 485 NW2d 676 (1992). However, a premises owner owes no duty to protect or warn as to open and obvious condition, unless he should anticipate harm despite the invitee's knowledge of the condition. *Id.* at 96. An open and obvious condition is one that is apparent upon casual inspection by the average person of ordinary intelligence. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474; 499 NW2d 379 (1993). In assessing whether a particular condition is open and

obvious, the relevant inquiry is whether the condition as presented was reasonably apparent upon casual inspection; whether steps could have been taken to make the condition more open and obvious is irrelevant. *Id.* at 475.

As the trial court correctly determined, the tub was open and obvious because of its appreciable size, its dark color which stood in marked contrast to the light-colored floor, and its placement out in the open. Further support for this conclusion is the fact that plaintiffs' daughter noticed the tub. Plaintiffs' arguments about the distractive nature of grocery store displays is meritless because plaintiff Cindy Randolph did not testify that she was distracted. Instead, she could say only that she did not see the tub, but she could not offer any explanation as to why. Plaintiff's testimony to the effect that she could have been looking at the magazine racks, with the implication that she was distracted by them, is not sufficient to withstand a motion for summary disposition. Conjecture or speculation is insufficient to establish a genuine issue of material fact. *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993).

Maurer v Oakland Co Parks and Recreation Dept (After Remand), 449 Mich 606; 537 NW2d 185 (1995), is instructive. In *Maurer,* the plaintiff fell on an unmarked step when exiting a park building. *Id.* at 618. Our Supreme Court held that the trial court's grant of summary disposition to the defendant was correct given that the plaintiff was able to offer no explanation as to why she fell other than she simply did not see the step. *Id.* at 621. The Court considered the following testimony, which it quoted, particularly noteworthy:

> Q: So you had an accident that you claim is attributable to some problem with the step, is that correct?
>
> A: Yes.
>
> Q: What is the problem, as you perceive it?
>
> A: I just didn't see the step there.
>
> Q: You just didn't see the step. And is there any reason you didn't see the step?
>
> A: I don't now. I just – it just didn't – you know how you spot things; I just did not see it. [*Id.* at 619.]

Plaintiff's testimony in the present case is no stronger. She did not assert that she was distracted in any way. It is clear that the sole cause of her mishap was her own inadvertence and not any negligence attributable to defendant. The trial court correctly decided that the tub was an open and obvious condition and properly granted summary disposition on that basis.

Plaintiffs also contend that the trial court granted defendant's motion prematurely given that the discovery period was still open and that additional discovery would have revealed that defendant intended and expected customers, like plaintiff, to be distracted by store displays. We disagree.

Plaintiffs failed to preserve this issue by not raising it below. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). Even if plaintiffs had preserved this issue, the grant of summary disposition was not premature. Generally, summary disposition should not be granted before the close of discovery; however, summary disposition may nonetheless be appropriate where further discovery does not stand a reasonable chance of uncovering factual support for the position of the nonmoving party. *Hasselbach v TG Canton, Inc*, 209 Mich App 475, 481-482; 531 NW2d 715 (1995). Plaintiffs wanted discovery of defendant's employees to try to establish that defendant intended and expected patrons to be distracted by store displays. However, even if established, this would not lend any additional support to plaintiffs' position or make summary disposition less appropriate because plaintiff testified that she did not know why she failed to see the tub and did not testify that she was distracted by the store displays.

We affirm.

/s/ Martin M. Doctoroff
/s/ Harold Hood
/s/ Richard A. Bandstra