STATE OF MICHIGAN

COURT OF APPEALS

ROSE MARIE SNYDER,

Plaintiff-Appellant,

v

JACK'S FRUIT MARKET,

Defendant-Appellee.

UNPUBLISHED
January 17, 1997

No. 188581
Bay Circuit Court
LC No. 95-003040-NO

Before: McDonald, P.J., and Murphy and M.F. Sapala,* JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendant. We reverse and remand.

On December 24, 1993, plaintiff was shopping in defendant's grocery store. Plaintiff alleges that as she approached the milk coolers, she slipped in a puddle of water approximately the size of a basketball, fell, and injured herself. After plaintiff fell, she got up to find her husband, who was also in the store, to show him where she had fallen. Plaintiff claims that an employee of defendant saw her fall, and that when plaintiff and her husband returned to the area of her fall, the puddle had been cleaned up and a "caution" sign had been placed nearby.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that the puddle of water was an open and obvious danger. The trial court did not address the open and obvious claim, but ruled in favor of defendant on the grounds that there was no evidence that defendant knew, prior to plaintiff's fall, that there was a puddle of water on the floor or that defendant had caused the water to be on the floor.

We review decisions on motions for summary disposition de novo. *Kellogg Co v Dep't of Treasury*, 204 Mich App 489, 492; 516 NW2d 108 (1994). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of a claim. We must give the benefit of

* Recorder's Court judge, sitting on the Court of Appeals by assignment.

reasonable doubt to and make all reasonable inferences in favor of the nonmoving party and determine whether a genuine issue of fact exists. *Skinner v Square D Co*, 445 Mich 153, 161-162; 516 NW2d 475 (1994). This Court is liberal in finding a genuine issue of fact. *Lash v Allstate Ins Co*, 210 Mich App 98, 101; 532 NW2d 869 (1995).

Plaintiff submitted the affidavit[1] of an employee of defendant, which states that in December 1993, coolers in defendant's meat department were not draining properly, and water was leaking in front of the meat cases and milk coolers. The affiant also stated that this condition went unrepaired for over a month, and defendant's employees were "constantly" attempting to keep the floor free of water. In light of this evidence, it was incorrect to grant summary disposition on the grounds stated by the trial court. Although plaintiff was unsure if the clear substance on the floor was water and did not state whether she believed the substance had leaked from the meat coolers, the affidavit provides the factual basis for the legitimate inference that plaintiff may have slipped in a puddle of water that had collected on the floor because defendant's meat coolers may not have been working properly. Based on the circumstantial evidence, summary disposition on the grounds that defendant did not have notice of the condition was improper for two reasons. First, there are questions of fact as to whether the substance on the floor was water that had collected due to a leaking meat cooler, and if so, whether defendant knew of the cooler's propensity to leak, i.e., whether defendant had notice of the condition. Second, there is a question of fact whether, through negligent maintenance of the coolers, defendant may have created a dangerous condition. Where a defendant or a defendant's agents create a dangerous condition, proof that defendant had notice of the condition is unnecessary. *Williams v Borman's Foods*, 191 Mich App 320, 321; 477 NW2d 425 (1991).

Defendant argues that, because plaintiff stated that if she had looked she would have seen the puddle before she fell, the danger was open and obvious and defendant cannot be held liable. We disagree.

An invitor's legal duty is to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition on the land that the landowner knows or should know the invitees will not discover, realize, or protect themselves against. *Williams v Cunningham Drug Stores*, 429 Mich 495, 499; 418 NW2d 381 (1988). The open and obvious danger doctrine will cut off liability if a condition creates a risk of harm only because the invitee does not discover the condition if the invitee should have discovered the condition and realized its danger. *Bertrand v Allan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995). However, if the risk of harm remains unreasonable, despite its obviousness, then the circumstances may be such that the invitor is required to undertake reasonable precautions to protect the invitee. *Id*. The open and obvious doctrine does not relieve the invitor of his general duty of reasonable care. *Id*.

In this case, plaintiff alleges that the puddle was located inside a grocery store near a cooler containing several products for sale. In light most favorable to plaintiff, one can reasonably argue that because a shopper may be distracted by product displays and promotions, or preoccupied with the search for the desired product, or other thoughts related to the shopping experience as they walk through the store, it may not be unreasonable for a shopper not to notice a puddle of water on the floor.

Therefore, we consider it to be a question of fact as to whether plaintiff should have discovered the puddle of water and realized its danger. Also, even assuming the danger was obvious, we find that questions of fact would remain as to whether, despite its obviousness, the risk of harm remained unreasonable and whether defendant should have anticipated the harm and taken reasonable precautions to protect plaintiff. In other words, even if plaintiff should have discovered the puddle, it would still be a question of fact whether defendant's conduct, under the circumstances as they existed, was reasonable.

Being liberal in finding a genuine issue of material fact and giving the benefit of the doubt to plaintiff, we find that a record might be developed that would leave open an issue upon which reasonable minds might differ. Summary disposition was not proper.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Gary R. McDonald
/s/ William B. Murphy
/s/ Michael F. Sapala

[1] A hearing on defendant's motion for summary disposition was held on July 24, 1995. At the end of the hearing, the trial court rendered its opinion. However, the trial court gave plaintiff until August 11, 1995, to file a motion indicating she had discovered new information before it would sign the order granting defendant's motion. The affidavit was submitted to the trial court at 7:45 a.m. on August 11, 1995, along with a motion objecting to the entry of the order granting summary disposition. The trial court filed the order, dated August 11, 1995, on August 16, 1995.