

STATE OF MICHIGAN
COURT OF APPEALS

ANGELA MATUSCAK,

Plaintiff-Appellant,

v

WALGREEN CO.,

Defendant-Appellee.

UNPUBLISHED

July 19, 2005

No. 261319

Macomb Circuit Court

LC No. 04-001156-NI

Before: Neff, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

In this premises liability case, plaintiff appeals as of right an order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We reverse and remand.

Plaintiff filed a complaint alleging that, while shopping at defendant's store, she rounded a corner and tripped over crates full of merchandise left on the floor. After a brief period of discovery, defendant moved for summary disposition under MCR 2.116(C)(8) & (10), in part on the ground that the crates plaintiff tripped over were an open and obvious condition from which it had no duty to protect plaintiff. The trial court agreed and granted defendant's motion.

To establish a prima facie case of negligence, a plaintiff must prove that the defendant had a duty, "recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks." (Footnote omitted.)" *Holloway v Martin Oil Service*, 79 Mich App 475, 478; 262 NW2d 858 (1977), quoting Prosser, Torts (4th ed), p 255. If the defendant owed no duty to the plaintiff, the negligence analysis can proceed no further. *Id.* The threshold issue of the duty of care in negligence actions must be decided by the trial court as a matter of law. *Riddle v McLouth Steel Products*, 440 Mich 85, 95; 485 NW2d 676 (1992). However, the existence of facts, which give rise to a duty, is a question of fact for the jury to decide. *Holloway, supra* at 479. In *Bonin v Galewicz*, 378 Mich 521, 526-527; 146 NW2d 647 (1966), our Supreme Court explained the distinction between the role of the jury and the role of the trial court when determining whether a defendant had a duty:

Usually, in negligence cases, whether a duty is owed by the defendant to the plaintiff does not require resolution of fact issues. However, in some cases, as in this one, fact issues arise. When they do, they must be submitted to the jury, our traditional finders of fact, for ultimate resolution and they must be accompanied

by an appropriate conditional instruction regarding defendant's duty, conditioned upon the jury's resolution of the fact dispute.

Hence, where the facts necessary to make a determination regarding the duty owed by a defendant to a plaintiff are not disputed, it is the trial court's responsibility to decide the legal import of those facts. However, if there are disputed facts, which, depending on how those facts are resolved, could alter the determination that the defendant owed a duty to the plaintiff, those facts must be submitted to the jury with an appropriate instruction. *Id.*

In cases of premises liability, there is a general duty on the part of the party in possession of the premises to take reasonable steps to protect invitees¹ from an unreasonable risk of harm caused by dangerous conditions present on the premises. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). "However, this duty does not generally encompass removal of open and obvious dangers." *Id.* The Court in *Lugo* further explained that "the open and obvious doctrine should not be viewed as some type of 'exception' to the duty generally owed invitees, but rather as an integral part of the definition of that duty." *Id.* Thus the "general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but, if 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.* at 517. An open and obvious danger exists where the dangers "are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them." *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002) (quoting *Riddle, supra* at 96). When determining whether a condition is open and obvious, the court applies a reasonable person standard. *Novotney v Burger King (On Remand)*, 198 Mich App 470, 474; 499 NW2d 379 (1993) ("[A]n obvious danger is no danger to a reasonably careful person.") (citation omitted). A dangerous condition is open and obvious if it is "readily apparent or easily discoverable upon casual inspection by the average user of ordinary intelligence." *Id.* at 473 (quoting *Glittenberg v Doughboy Recreational Industries (On Reh)*, 441 Mich 379; 491 NW2d 208 (1992)).

Because the open and obvious doctrine goes to the heart of the duty element in premises liability cases, *Lugo, supra* at 516, and the duty element is a matter of law for the trial court, *Holloway, supra* at 478, whether a dangerous condition is open and obvious is a matter of law for the trial court. However, if there are disputed facts concerning the nature of a dangerous condition, such that the resolution of the facts are necessary before the trial court can determine whether the condition is open and obvious, then the facts must be submitted to the jury for resolution.

¹ An invitee is a person who enters upon the land of another by invitation with the implied representation that reasonable care has been used to make the premises safe for the invitee. *Stitt v Holland Abundant Life*, 462 Mich 591, 596-597; 614 NW2d 88 (2000). Invitee status is commonly afforded to persons entering upon the property of another for business purposes. *Id.* at 597. It is undisputed that plaintiff was on defendant's property for a business purpose and, therefore, was an invitee.

At the hearing on the defendant's motion, the trial court granted defendant's motion for summary disposition based in part on plaintiff's deposition testimony. Because the trial court looked beyond the pleadings in making its determination, this Court will consider the motion granted pursuant to MCR 2.116(C)(10). *DeHart v Lunghamer Chevrolet, Inc*, 239 Mich App 181, 184; 607 NW2d 417 (1999). This Court reviews de novo the grant or denial of summary disposition to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Id.* at 120.]

The trial court granted defendant's summary disposition motion on the sole ground that the crates, as a matter of law, were an open and obvious condition. However, if the crates were concealed from view, such that they would not be "readily apparent or easily discoverable upon casual inspection by the average user of ordinary intelligence," *Novotney, supra* at 473, they may not have been open and obvious. See also *Lugo, supra* at 521 (holding that, where the plaintiff failed to present evidence that an ordinary pothole was obscured by debris, the pothole was open and obvious as a matter of law). While we agree that four or five milk crates on a floor generally constitute an open and obvious condition, we also recognize that if the crates were sufficiently far down the aisle to be obscured from view by an ordinary person rounding the corner of the aisle, but not sufficiently far down the aisle to give an ordinary person sufficient time to avoid them, they may not have constituted an open and obvious condition.

In the present case, the only evidence presented to the trial court during the motion for summary disposition was plaintiff's deposition testimony. In her testimony, plaintiff stated, "As you turned, they [the crates] were right at the corner." Taking this evidence in the light most favorable to plaintiff, one could conclude that the crates were placed in such a way that a person rounding the corner of the aisle would not see them until it was too late to react to their presence. Hence, plaintiff has presented a fact question with regards to the placement of the crates, and, consequently, the trial court could not properly determine that the crates were open and obvious as a matter of law.

Defendant next argues that this Court should affirm the trial court's grant of summary disposition because plaintiff has failed to present any evidence that defendant had notice of the unsafe condition. See *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001). However, although raised in defendant's motion for summary disposition, the trial court never addressed this issue, but rather granted summary disposition on the sole basis that the crates were open and obvious as a matter of law. Therefore, this issue has not been properly preserved for appellate review and we decline to address it. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 532-533; 672 NW2d 181 (2003).

Because the open and obvious nature of the crates could not be ascertained without findings of fact properly left to the jury, the trial court erred when it granted defendant's motion

for summary disposition on the ground that the crates were open and obvious as a matter of law. Likewise, plaintiff has presented sufficient evidence to create a fact question regarding whether defendant was responsible for creating the dangerous condition.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff

/s/ Michael R. Smolenski

/s/ Michael J. Talbot