

STATE OF MICHIGAN
COURT OF APPEALS

MARIAN PELZNER,

Plaintiff-Appellant,

v

MEIJER, INC.,

Defendant-Appellee.

UNPUBLISHED

June 4, 2002

No. 230448

Oakland Circuit Court

LC No. 99-017085-NO

Before: Fitzgerald, P.J., and Holbrook, Jr., and Doctoroff, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

While exiting defendant store, plaintiff allegedly tripped over the leg of defendant's employee, who was bringing shopping carts into the store from outside. The incident occurred while the employee was entering the store through an exit door, pushing the carts ahead of him. While the employee was entering the store through the doorway, plaintiff used the same doorway to exit the store. The employee pushed the carts, extending his leg behind him, and plaintiff asserts she tripped over the employee's leg, falling to the ground. Plaintiff allegedly suffered injuries to her face, nose, mouth, jaw, shoulders, neck and back.

Plaintiff brought this action against defendant. In her complaint, she alleged that she was defendant's invitee. She further alleged that defendant failed to maintain its premises in a reasonable and safe condition, to give plaintiff adequate notice of known dangerous conditions, to design the premises to allow invitees to traverse the premises in a reasonably safe manner, and to properly train its employees. Plaintiff later presented a theory that defendant was negligent in the manner by which it brings the shopping carts in from outside. She asserted that defendant's practice of bringing the carts inside through an exit door is unsafe and created an unreasonable risk of harm. The trial court granted defendant's motion for summary disposition, finding that there was no unusual risk of harm and defendant owed no duty to plaintiff.

Plaintiff argues that the trial court erred in that it improperly substituted its judgment for that of the jury and that there exist genuine issues of material fact. We disagree. Because the trial court examined evidence outside the pleadings when rendering its decision, the issue will be reviewed under the standard of review applicable to motion brought under MCR 2.116(C)(10).

Kubisz v Cadillac Gage Textron, Inc, 236 Mich App 629, 633, n 4; 601 NW2d 160 (1999). This Court reviews decisions on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to damages as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).]

Plaintiff fails to directly address the basis for the trial court's decision, i.e., that defendant owes no duty to plaintiff. Instead, plaintiff focuses on whether the trial court improperly considered which individual—plaintiff or defendant's employee—was negligent. Because she has not addressed the basis for the trial court's decision, we need not consider the relief she requests. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 75; 568 NW2d 365 (1997). Nonetheless, we find this argument to be without merit.

An invitor may be liable to an invitee who is injured as a result of the invitor's failure to warn of a hazardous condition or the invitor's negligent maintenance of the premises or by defects in the physical structure of a building. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 610; 537 NW2d 185 (1995). The invitor is not liable to invitees for injuries caused by an activity or condition of the land, the danger of which is known or obvious to the invitee, unless the invitor should anticipate harm despite the invitee's knowledge or the obviousness of the condition or activity. *Riddle v McLouth Steel Products*, 440 Mich 85, 94; 485 NW2d 676 (1992), citing 2 Restatement Torts, 2d § 343(A)(1). Further, although an invitee may not have a duty to warn of an open and obvious condition, it may have a duty to protect an invitee against foreseeably dangerous conditions. “[T]he open and obvious doctrine does not relieve the invitor of his general duty of reasonable care.” *Bertrand, supra* at 611. Thus, “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.” *Lugo v Ameritech Corp*, 464 Mich 512, 517; 629 NW2d 384 (2001).

The condition/activity at issue—the employee pushing shopping carts into the store through the exit door—was open and obvious. We find that no special aspects of this open and obvious risk exist so as to impose upon defendant the duty to protect plaintiff from the risk. In *Lugo*, the Court explained: “[O]nly those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine.” *Id.* at 519. We conclude that the pushing of shopping carts into the store from the parking lot does not create a high likelihood of harm, and the severity of harm is not great. Thus, we conclude that the trial court's decision is correct because this open and obvious condition was not unreasonably dangerous.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Martin M. Doctoroff