

STATE OF MICHIGAN
COURT OF APPEALS

BARBARA MARONEK,
Plaintiff-Appellee,

UNPUBLISHED
May 6, 2008

v

WAL-MART STORES, INC.,
Defendant-Appellant,

No. 280845
Dickinson Circuit Court
LC No. 05-014132-NO

and

FOUR SEASONS BEER DISTRIBUTORS, INC.,
Defendant.

Before: White, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Our Supreme Court has remanded this case for consideration as on leave granted. Defendant Wal-Mart Stores, Inc., appeals the trial court's denial of its motion for summary disposition.¹ We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was shopping with her sister in defendant's Iron Mountain store. She was walking down a main aisle, attempted to turn into an adjacent aisle, and tripped on the corner of a pallet, which served as the base for a beer display. Plaintiff fractured her hip and femur in the fall. The pallet, which was black, sat on white floor tiles and was aligned with and located at the end of an aisle. Plaintiff was not watching where she was walking when she tripped.

Plaintiff filed suit, alleging that defendant breached its duty to maintain its premises in a reasonably safe condition. Defendant moved for summary disposition pursuant to MCR

¹ Defendant Four Seasons Beer Distributors, Inc., was granted summary disposition in a prior order and is not involved in this appeal.

2.116(C)(10), arguing that the condition about which plaintiff complained was open and obvious and presented no special aspects that rendered it unreasonably dangerous in spite of its open and obvious nature. In response, plaintiff provided an affidavit from an expert, in which the expert averred that the uniform stacking of the beer boxes on top of the pallet in conjunction with the boxes' alignment created a virtual wall that would indicate to a customer that she could proceed around the corner if she walked around the virtual wall of beer cases. The expert asserted that the display created a trap and that the hazard was not objectively visible to customers.

The trial court denied defendant's motion for summary disposition, accepting plaintiff's argument that the reasoning used by the Court in *Dunkle v Kmart Corp*, unpublished opinion per curiam of the Court of Appeals, issued August 26, 2003 (Docket No. 218789), should apply in this case.

Defendant contends that the trial court erred in denying its motion for summary disposition because there was no genuine issue of material fact that the pallet on which plaintiff tripped was an open and obvious danger. We agree. We review the decision of a trial court on a motion for summary disposition de novo. *Associated Builders & Contractors v Dep't of Consumer & Industry Services Director*, 472 Mich 117, 123; 693 NW2d 374 (2005).

A possessor of land owes an invitee a duty to exercise reasonable care to protect the invitee from unreasonable risks of harm caused by dangerous conditions on the premises. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). This duty does not encompass the removal of open and obvious dangers. *Id.* However, "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. In determining whether a condition presents an open and obvious danger, an objective test should be used to establish whether an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993).

In this case, the danger complained of was a pallet located at the end of an aisle on which boxes of beer were stacked. The edge of the pallet was exposed as customers removed beer for purchase from the stack. Because the dark color of the pallet contrasted with the white floor on which the pallet sat, a casual inspection of the area by a person of ordinary intelligence would have revealed the exposed corner and that it could present a tripping hazard. In addition, plaintiff acknowledged that she was not watching where she was walking; rather, she was looking ahead toward her sister. Plaintiff admitted that she could have seen the pallet corner if she had been looking down.

Plaintiff's argument that a normal shopper would be expected to look forward when turning into an aisle to avoid collisions with other shoppers or to scout out display signs is not legally persuasive. Case law establishes that a reasonably prudent person will watch where she is going and take appropriate steps to ensure her own safety. See *Bertrand v Alan Ford, Inc*, 449 Mich 606, 616; 537 NW2d 185 (1995).

Moreover, we find plaintiff's attempt to preclude summary disposition by arguing that her expert's affidavit created a genuine issue of fact unavailing. Plaintiff conceded that she would have seen the pallet had she been watching where she was walking.

Finally, plaintiff's reliance on the reasoning of *Dunkle, supra*, and the trial court's adoption of that reasoning, is misplaced. *Dunkle* is factually distinguishable from the instant case. The plaintiff in *Dunkle* was injured when, upon turning a corner into an aisle, he tripped over a pallet. The pallet was labeled a "trap" because it was not aligned with the aisle. It jutted approximately 18 to 20 inches into the aisle, while the product stacked upon it remained in line with shelves of the aisle. However, the pallet in this case was aligned with the end of the aisle and did not create a trap for unwary shoppers.

In this case, plaintiff would have noticed the pallet had she been watching where she was walking. Had plaintiff simply watched her step, any risk of harm would have been obviated. See *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 497; 595 NW2d 152 (1999); *Spagnuolo v Rudds #2, Inc*, 221 Mich App 358, 360-361; 561 NW2d 500 (1997).

Reversed.

/s/ Helene N. White

/s/ Joel P. Hoekstra

/s/ Michael R. Smolenski