

STATE OF MICHIGAN
COURT OF APPEALS

MERLE WEEKS and JEANETTE WEEKS,
Plaintiffs-Appellants,

UNPUBLISHED
January 6, 2011

v

MENARD, INC.,

No. 294208
Eaton Circuit Court
LC No. 08-000818-NO

Defendant-Appellee.

Before: BECKERING, P.J., and TALBOT and OWENS, JJ.

PER CURIAM.

In this premises liability case, plaintiffs appeal as of right from an order granting defendant's motion for summary disposition. We affirm.

Plaintiffs, Merle and Jeanette Weeks, were shopping for lawn fertilizer at defendant Menard's store. Merle spotted bags of fertilizer lying on a wooden pallet in the garden center. In order to reach the last remaining bags of fertilizer, Merle bent under some low hanging shelves and stepped on the pallet. As he picked up one of the bags and turned, the pallet broke under his right foot. He lost his balance and fell backwards, hitting his head on a steel post and sustaining injury.

Plaintiffs argue that the trial court erred in finding that there was no genuine issue of material fact regarding whether defendant breached a duty owed to plaintiffs. We disagree.

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). This Court reviews a "motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Moreover, the Court considers only "what was properly presented to the trial court before its decision on the motion." *Pena v Ingham County Rd Comm'n*, 255 Mich App 299, 310; 660 NW2d 351 (2003). Summary disposition "is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Latham*, 480 Mich at 111. "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light

most favorable to the nonmoving party.” *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

“The general principles of premises liability are well understood [That is,] social policy imposes on possessors of land a legal duty to protect their invitees on the basis of the special relationship that exists between them.” *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). “The duty that a possessor of land owes to another person who is on the land depends on the latter person’s status. The status of a person on land that the person does not possess will be one of the following: (1) a trespasser, (2) a licensee, or (3) an invitee.” *Hampton v Waste Management of Michigan, Inc*, 236 Mich App 598, 603; 601 NW2d 172 (1999) (citation omitted). An invitee is “ ‘a person who enters upon the land of another upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make [it] safe for [the invitee’s] reception.’” *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000); *Wymer v Holmes*, 429 Mich 66, 71 n 1; 412 NW2d 213 (1987), overruled on other grounds 470 Mich 661 (2004). Plaintiffs were invitees when they were shopping in defendant’s store.

The landowner has a duty of care, not only to warn the invitee of any known dangers, but the additional obligation to also make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards. *Stitt*, 462 Mich at 597. Thus, an invitee is entitled to the highest level of protection under premises liability law. *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 256; 235 NW2d 732 (1975). A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if the owner: (a) knows of, or by the exercise of reasonable care would discover, the condition and should realize that the condition involves an unreasonable risk of harm to such invitees; (b) should expect that invitees will not discover or realize the danger, or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect invitees against the danger. *Stitt*, 462 Mich at 597.

However, while the premises owner has a duty to reasonably inspect the premises and reasonably make the premises safe for his invitees, “a premises owner is not an insurer of the safety of invitees.” *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 94; 485 NW2d 676, 679 (1992). Specifically, “a possessor of land does not owe a duty to protect his invitees where conditions arise from which an unreasonable risk cannot be anticipated or of dangers that are so obvious and apparent that an invitee may be expected to discover himself.” *Id.* Where the invitee knows of the danger or where it is so obvious that a reasonable invitee should discover it, a premises owner owes no duty to protect the invitee unless harm should be anticipated despite the invitee’s awareness of the condition. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001); *Riddle*, 440 Mich at 96.

Here, plaintiffs failed to provide evidence that defendant would have discovered the vulnerable pallet by inspection or that defendant would have had any reason to believe that the pallet, which at one time supported the weight of fertilizer bags, would break under the weight of a person. Merle testified that he did not see a defect before he stepped on the pallet.

Plaintiffs also assert that defendant breached a duty to warn; however, the duty to warn extends to known dangers or any dangers that a reasonable inspection could have discovered.

Wymer, 429 Mich at 71 n 1. Because there is no evidence to suggest that defendant knew, or should have known, of a condition on the pallet that involved an unreasonable risk of harm, defendant had no duty to warn.

Plaintiffs next argue that the arrangement of the merchandise was not an open and obvious condition. To determine whether a condition presents an open and obvious danger, an objective test is used to establish whether an average person of ordinary intelligence would have discovered the danger upon casual inspection. *Novotney*, 198 Mich App at 474-475. We conclude that such person would have foreseen the dangers of stepping on a wooden pallet under the clearly visible low hanging shelves. Furthermore, the average person, when stepping on a pallet, would discover the potential danger that the wood may break and cause injury. Therefore, the trial court did not err in finding that the condition was open and obvious.

Additionally, plaintiffs contend that there were special aspects to the merchandise display that made the risk of harm unreasonably dangerous and unavoidable. “[I]f 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*, 464 Mich at 516. To constitute a special aspect sufficient to remove a condition from the open and obvious danger doctrine, the condition must pose a uniquely dangerous potential for severe harm or be effectively unavoidable. *Id.* at 517-519. We find that the factual dispute surrounding the issue of whether the pallet was unavoidable does not preclude summary disposition because plaintiff could have asked for help in getting a bag of fertilizer.¹

Plaintiffs next argue on appeal that the trial court erred in finding that their case was exclusively a premises liability claim. We disagree. If a plaintiff suffers injury arising from a condition on the land, rather than an activity conducted on the land, the claim sounds in premises liability. *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001). Plaintiffs did not plead a claim of ordinary negligence, which requires that plaintiffs assert a prima facie case of negligence.² Plaintiffs allege that defendant is liable under a negligence cause of action because of the “active negligence” of its employees. *See Berryman v K Mart Corp*, 193 Mich App 88, 92; 483 NW2d 642 (1992). However, plaintiff misunderstands the nature of “active negligence;”

¹ Plaintiffs contend that the trial court erred by relying on photographs of the pallet submitted by defendant to conclude that plaintiff could have taken a fertilizer bag from another pallet. Plaintiffs argue that the photographs were inadmissible for lack of proper foundation because the photographs did not accurately portray the pallet that caused Merle’s injuries. Plaintiffs’ argument fails because the photograph was properly authenticated under MRE 901(a) by the assistant general manager of defendant’s store, who testified that the photographs depicted the actual pallet on which Merle claimed to be injured.

² The elements of a prima facie case of negligence are “(1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant’s breach of its duty was a proximate cause of the plaintiff’s injuries, and (4) the plaintiff suffered damages.” *Berryman*, 193 Mich App 91-92.

this “principle applies only where an employee of a premises possessor creates a dangerous condition through an unreasonable act or omission that breaches a duty owed to a visitor on the land.” *Hampton v Waste Management of Michigan, Inc*, 236 Mich App 598; 601 NW2d 172 (1999). Plaintiffs contend that because the store employees were “horsing around” in the aisles, rather than restocking the pallets with bags of fertilizer, their behavior constituted an “omission” that breached the duty. However, the omission must *create* the dangerous condition. Any horseplay by the employees and their failure to replenish the pile of fertilizer did not cause the dangerous condition. The condition that caused Merle’s injury was the weakened pallet, which was present regardless of the action or inaction of the store’s employees.

Finally, plaintiffs contend that defendant’s failure to follow its own procedures regarding restocking and storing merchandise constituted a breach of duty for purposes of a common negligence action. A “violation of an internal policy or guideline is not negligence *per se*.” *Estate of Jilek ex rel Jilek v Stockson*, ___Mich App___; ___NW2d___ (2010). Plaintiffs must also establish that there is a legal duty that requires defendant to “conform to a particular standard of conduct in order to protect others against unreasonable risks of harm.” *Graves v Warner Bros*, 253 Mich App 486, 492; 656 NW2d 195 (2002). Again, the only duty that plaintiffs allege that defendant breached stems from defendant’s duty to protect plaintiffs from an unreasonably dangerous condition on the land; here, the pallet. Whether store employees violated a restocking policy does not change the underlying nature of this case. Thus, the trial court did not err in concluding that this case sounds purely in premises liability.

Affirmed.

/s/ Jane M. Beckering
/s/ Michael J. Talbot
/s/ Donald S. Owens