

STATE OF MICHIGAN
COURT OF APPEALS

LINDA HANNA,

Plaintiff-Appellee,

v

WAL-MART STORES, INC.,

Defendant-Appellant.

UNPUBLISHED

April 13, 2001

No. 219477

Livingston Circuit Court

LC No. 98-016551-NO

Before: Talbot, P.J., and Hood and Gage, JJ.

Talbot, J. (*dissenting*).

I respectfully dissent because I conclude that defendant was entitled to summary disposition.

The majority notes the conflicting evidence regarding the height of the fold in the mat, and states that a question of fact existed with respect to the cause of plaintiff's fall. I submit that causation is not the relevant inquiry. It is first necessary to establish that defendant owed plaintiff a duty. The law imposes a duty on defendant to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition on the land that defendant knows or should know the invitees will not discover, realize, or protect themselves against. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). This duty does not extend to conditions that are open and obvious. *Id.* at 610. A danger is open and obvious if an average person of ordinary intelligence would have been able to discover the danger and risk presented upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). Defendant may still have a duty to exercise reasonable care to prevent harm to the invitees if the risk of harm remains unreasonable despite the open and obvious nature of the condition. *Bertrand, supra* at 611. Therefore, it is necessary to first determine whether the condition of the floor mat was open and obvious.

Plaintiff's deposition testimony indicated that she did not see the fold in the floor mat because of the crowd of children around her as she was exiting defendant's store. Plaintiff admitted that when she later exited the store after reporting her injury, the mat was in the same condition as when she fell, and she had no difficulty seeing the fold in the mat. Plaintiff attributes her failure to see the fold to the children in the area who were also attempting to exit the store. Although the crowd may have prevented plaintiff from seeing the fold in the mat, the open and obvious nature of the mat is not changed by this factor. Plaintiff could have easily seen

the fold in the mat if she had been watching where she was stepping rather than paying attention to the children. Viewed in the light most favorable to plaintiff, plaintiff's testimony did not establish a question of fact regarding the open and obvious nature of the risk posed by the fold in the floor mat.

I further disagree with the majority's conclusion that even if the condition was open and obvious, a question of fact remained regarding whether the mat posed an unreasonable risk of harm. Here, the majority improperly focuses on the foreseeability of the risk of harm. "[T]he question is not the foreseeability of harm. Rather the question for the courts to decide is whether the risk of harm remains unreasonable, despite its obviousness or despite the invitee's knowledge of the danger." *Singerman v Municipal Service Bureau, Inc*, 455 Mich 135, 142-143; 565 NW2d 383 (1997) (Weaver, J., joined by Boyle and Riley, JJ.).

The majority cites evidence that on the day in question, defendant's store was particularly busy and that plaintiff claimed she did not see the fold in the mat because a crowd of children surrounded her as she attempted to exit the store. However, the fact that plaintiff failed to see the fold in the mat is irrelevant to whether the risk was unreasonable. *Bertrand, supra* at 621. Moreover, I cannot subscribe to the majority's implication that the reasonable or unreasonable nature of the risk is to be determined by the subjective factor of what constitutes a busy shopping day at defendant's store. Applying the majority's reasoning, the reasonable or unreasonable risk posed by the fold in the mat will vary depending on the number of people in defendant's store at a given time. It would appear that the majority would impose a duty to alleviate the hazard on days when customer traffic is high, and relieve defendant of that duty on slow business days. Further, it is unclear whether the majority would impose this duty based on the number of persons inside the store at a given time, or just the number of persons in the immediate vicinity of plaintiff as she approached the floor mat. It is possible that even on a slow business day, an invitee may nonetheless find herself surrounded by a group of children at the time she exits the store, just as even on a busy shopping day, an invitee may be able to exit the store alone. The endless permutations are impossible for a defendant to anticipate.

This is a simple, straightforward matter. I conclude that as a matter of law, the fold in the floor mat was an open and obvious condition, and that the risk of harm was not unreasonable despite its open and obvious nature. Accordingly, I would reverse because defendant was entitled to summary disposition.

/s/ Michael J. Talbot