

STATE OF MICHIGAN
COURT OF APPEALS

MARY JANE VITALE,

Plaintiff-Appellant,

v

BORMAN'S, INC., d/b/a FARMER JACK'S,

Defendant-Appellee.

UNPUBLISHED
February 21, 2003

No. 238976
Macomb Circuit Court
LC No. 01-001352-NI

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

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant's motion for summary disposition in this premises liability action. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff slipped and fell on what appeared to be crushed berries on the floor of defendant's grocery store. The circuit court ruled that the danger created by the substance was open and obvious and dismissed the action.

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court considers the pleadings, depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), in the light most favorable to the nonmoving party. Summary disposition is appropriate if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

Plaintiff was an invitee in that she was on defendant's premises, which were held open for a commercial purpose. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 604; 614 NW2d 88 (2000). An invitor has a duty to protect his invitees from an unreasonable risk of harm caused by a dangerous condition of his land that the invitor knows or should know the invitees will not discover. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). This duty is not absolute. *Douglas v Elba, Inc*, 184 Mich App 160, 163; 457 NW2d 117 (1990). It does not extend to conditions from which an unreasonable risk of harm cannot be anticipated or to open and obvious dangers. *Id.*; *Hammack v Lutheran Social Services of Michigan*, 211 Mich App 1, 6; 535 NW2d 215 (1995).

An open and obvious danger is one that is known to the invitee or is so obvious that the invitee might reasonably be expected to discover it, i.e., it is something that an average user with ordinary intelligence would be able to discover upon casual inspection. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992); *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). A landowner does not owe a duty to protect invitees from any harm presented by an open and obvious danger unless special aspects of the condition, i.e., something unusual about the character, location, or surrounding conditions, make the risk of harm unreasonable. *Bertrand, supra* at 614-617. However, “only 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.” *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 519; 629 NW2d 384 (2001).

Plaintiff contends that the court erred in finding that the substance on the floor was an open and obvious hazard because plaintiff’s husband testified that plaintiff fell just as she rounded the corner of a display stand, thus permitting an inference that the stand blocked the hazard from plaintiff’s view. However, in her deposition, plaintiff expressly stated that nothing was blocking her view of the floor; she simply was not looking down at it.

Plaintiff also contends that the court erred in finding that the substance on the floor was an open and obvious hazard because defendant purposely diverted her attention by placing a fruit display immediately inside the store entrance. Plaintiff did not raise this argument below, therefore, it is not preserved for appellate review. *Camden v Kaufman*, 240 Mich App 389, 400 n 2; 613 NW2d 335 (2000). In any event, plaintiff testified at deposition that she was walking away from the fruit display when she fell.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Helene N. White
/s/ Joel P. Hoekstra