

STATE OF MICHIGAN
COURT OF APPEALS

ROLLAND VACHON,

Plaintiff-Appellant,

v

LOWE'S HOME CENTER,

Defendant-Appellee.

UNPUBLISHED

March 15, 2005

No. 252394

Monroe Circuit Court

LC No. 01-013903-NZ

Before: Wilder, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition in favor of defendant, Lowe's Home Center, pursuant to MCR 2.116(C)(10) in this premises liability action. We affirm.

Plaintiff went to Lowe's to measure and price L-shaped metal shelf brackets. As is typical with many of the products at the self-serve home improvement store, the brackets were not individually packaged but, rather, in a box. Plaintiff removed a bracket from the box and noticed that it was jammed together with another bracket. When plaintiff tried to pry the brackets apart his left thumb was cut on a sharp edge of the bracket. Plaintiff filed suit against defendant, alleging that defendant breached its duty to maintain a safe premises and to warn plaintiff of dangers that were not open and obvious.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), arguing that the condition was open and obvious and that defendant did not have notice of the hazard. The trial court granted defendant's motion, finding that the condition was open and obvious and that no special aspects removed the condition from analysis under the open and obvious doctrine. The trial court also found that defendant did not have notice of the condition.

Plaintiff now argues that the alleged hazard was not open and obvious because it could not be discovered upon casual inspection. In the alternative, he argues that special aspects of the hazard rendered it an unreasonable hazard despite its obviousness. He also contends that defendant should have known about the hazard. We disagree.

We review de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557; 664 NW2d 151 (2003). The trial court indicated that it granted the motion for summary disposition pursuant to MCR 2.116 (C)(8) and (C)(10), but because the

court considered evidence outside the pleadings we review the decision under the standard for MCR 2.116(C)(10). *Steward v Panek*, 251 Mich App 546, 554-555; 652 NW2d 232 (2002). A motion for summary disposition brought under MCR 2.116(C)(10) is properly granted when the trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the non-moving party and determines that no genuine issue of material fact exists. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999); *Payne v Farm Bureau Ins*, 263 Mich App 521, 525; 688 NW2d 327 (2004).

A premises owner owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech*, 464 Mich 512, 516; 629 NW2d 384 (2001). The duty generally does not encompass warning about or removing open and obvious dangers unless the premises owner should anticipate that special aspects of the condition render it harmful despite the invitee's knowledge of it. *Id.* Whether a hazardous condition is open and obvious depends on whether it is reasonable to expect that an average person of ordinary intelligence would have discovered 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). However, if special aspects of a condition make an open and obvious risk unreasonably dangerous, the premises owner has a duty to take reasonable precautions to protect invitees from that risk. *Lugo, supra* at 517. If the open and obvious condition has no such special aspects, the condition is not unreasonably dangerous. *Id.* at 517-519.

Plaintiff asserts that the hazard was not open and obvious because the shelf brackets were concealed in a box and their sharp edges were not apparent on casual inspection. Summary disposition on this issue was proper because plaintiff failed to come forward with any evidence that an average person of ordinary intelligence would not have discovered the sharp edges upon a casual inspection. See *Glass v Goeckel*, 262 Mich App 29, 33; 683 NW2d 719 (2004), quoting *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). Moreover, plaintiff did not cut himself on the sharp edges by reaching into the box and retrieving concealed shelf brackets. He hurt himself after he was already holding them, when he tried to pry apart brackets that were jammed together. An average person of ordinary intelligence would have discovered the danger of trying to pry apart jammed metal shelf brackets, and the trial court correctly found that plaintiff failed to establish a genuine issue of material fact regarding whether the hazard was open and obvious.

If the trial court determines that the hazard was open and obvious as a matter of law, then the court must consider whether "special aspects" of the condition create an unreasonable risk of harm. *Lugo, supra* at 517-518. In *Lugo*, the Supreme Court defined instances where a hazard, though open and obvious, has special aspects that present an unreasonable risk, and therefore, may be the source of liability. The two examples were defined by their unavailability or risk of severe injury. *Lugo, supra* at 523. The question is not the foreseeability of the harm but 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).

The jammed shelf bracket at issue here did not create an unreasonable risk of harm despite its open and obviousness. Plaintiff contends that the special aspects were that the shelf

brackets were concealed in a box and that he was compelled to handle the shelf brackets in order to buy them. Again, plaintiff was not harmed as a result of concealment of the brackets or by merely handling them. He was harmed after he took them from the box and tried to pry the jammed brackets apart. Further, plaintiff was not compelled to pry the brackets apart in order to purchase one of them. A prudent person would ask one of defendant's employees for assistance. An average person of ordinary intelligence would have recognized the danger that may arise from prying apart metal objects that are jammed together.¹

Plaintiff also argues that relief is warranted based on the doctrines of *res ipsa loquitur* and spoliation because defendant cannot produce the shelf brackets that injured him. These claims have no merit. Under the doctrine of *res ipsa loquitur*, an inference of negligence can arise when the plaintiff's injury (1) ordinarily would not have occurred in the absence of negligence, (2) was caused by an agency or instrumentality within the exclusive control of the defendant, and (3) was not due to any voluntary action or contribution of the plaintiff. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 194; 540 NW2d 297 (1995). In this case, plaintiff had the shelf bracket that cut him in his control and voluntarily acted to pry them apart. Therefore, his claim under *res ipsa loquitur* has no merit.

Plaintiff asserts that the spoliation of evidence by defendant requires that all inferences be resolved in favor of plaintiff. When a party destroys or loses material evidence, whether intentionally or unintentionally, and "the other party is unfairly prejudiced because it is unable to challenge or respond to the evidence," a trial court has the inherent authority to sanction the culpable party to preserve the fairness and integrity of the judicial system. *Brenner v Kolk*, 226 Mich App 149, 160; 573 NW2d 65 (1997). Here, defendant does not dispute plaintiff's account of the incident. Defendant concedes that a sharp edge on the metal shelf bracket cut plaintiff as he pulled two jammed shelf brackets apart. Plaintiff was not unfairly prejudiced by the loss of the bracket. Thus, the spoliation claim is unfounded.

We decline to consider plaintiff's breach of contract claim that arises out of defendant's alleged promise to pay plaintiff's medical expenses related to this injury. Plaintiff did not allege a breach of contract claim in his pleadings, nor did he argue such a claim before the trial court. An issue that is not raised in the pleadings nor argued before the trial court need not be addressed on appeal. *Higgins Lake Property Assoc v Gerrich Township*, 255 Mich App 83, 117; 662 NW2d 387 (2003).

Affirmed.

/s/ Kurtis T. Wilder
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly

¹ Because the condition was within the scope of the open and obvious doctrine, we need not consider whether defendant had actual or constructive notice of the hazard.