

STATE OF MICHIGAN
COURT OF APPEALS

ESTATE OF SALLY PACERNICK,

Plaintiff-Appellant,

V

FARMER JACK, a/k/a BORMAN'S INC.,

Defendant-Appellee.

UNPUBLISHED

April 1, 2003

No. 229538

Oakland Circuit Court

LC No. 99-017985-NO

Before: Saad, P.J., and Smolenski and Owens, JJ.

OWENS, J. (*dissenting*).

I respectfully dissent from the majority's decision and would affirm the learned trial judge in all respects.

As noted by the majority, to avoid summary disposition where a defendant claims that a danger was "open and obvious," a plaintiff must "come forth with sufficient evidence to create a genuine issue of fact that an ordinary user upon casual inspection could not have discovered the . . . condition." *Novotney v Burger King Corp*, 198 Mich App 470, 475; 499 NW2d 379 (1993). In the instant matter, I do not believe that reasonable minds could differ in finding that plaintiff *could have* discovered the condition upon casual inspection.

Every sentient customer in a supermarket providing shopping carts understands that shopping carts will be moving up and down the aisles. Indeed, a customer must be particularly alert for shopping carts when moving into or across an aisle from an endcap area. Unless a customer is visually impaired, he or she should certainly be able to notice such a pallet with "casual inspection." Here, plaintiff's injury was not caused by a shopping cart, but by a pallet stacked four feet high with bags of charcoal. This pallet was far larger and more noticeable than an ordinary shopping cart.

Further, unrebutted deposition testimony established that plaintiff "wasn't paying attention" and that she "skidded into" the pallet. In other words, this is not a case where an unsuspecting customer was struck by a pallet. I believe that, under the open and obvious doctrine, plaintiff cannot recover for injuries caused by her own failure to make at least a casual inspection of her surroundings. Even a mere glance would have revealed that there was a large obstacle in plaintiff's way. Accordingly, I conclude that reasonable minds could not differ in finding that plaintiff's cause of action was barred as a matter of law by the "open and obvious" doctrine. *Novotney, supra* at 475.

As the trial court noted, while it is unfortunate that plaintiff was apparently not looking where she was going and suffered minor injuries, that does not create liability. Because I believe that the trial court did not err in ruling as a matter of law that the danger was “open and obvious” and not unreasonable, I would affirm the trial court’s decision granting defendant’s motion for summary disposition.

/s/ Donald S. Owens