

STATE OF MICHIGAN
COURT OF APPEALS

JOHN D. ZACHARSKI and PENNY L.
ZACHARSKI,

UNPUBLISHED
May 22, 2007

Plaintiffs-Appellants,

V

No. 274410
Saginaw Circuit Court
LC No. 05-058518-NO

WAL-MART STORES, INC., d/b/a SAM'S
CLUB,

Defendant-Appellee.

Before: Cooper, P.J., and Murphy and Neff, JJ.

PER CURIAM.

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

While shopping at defendant's store, plaintiff Penny Zacharski caught her foot on a pallet beneath a box of watermelons and fell. Plaintiffs alleged claims for ordinary negligence and premises liability. The trial court held that plaintiffs' complaint sounded in premises liability only and that the hazard presented was open and obvious.

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). Questions of law are also reviewed de novo on appeal. *Minority Earth Movers, Inc v Walter Toebe Constr Co*, 251 Mich App 87, 91; 649 NW2d 397 (2002).

We find no error in the trial court's ruling dismissing plaintiffs' ordinary negligence claim.

Generally, negligence is conduct involving an unreasonable risk of harm. *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 5; 574 NW2d 691 (1997). To prove negligence, a plaintiff must establish a breach of duty owed by the defendant, which is a proximate cause of the plaintiff's injuries. *Skinner v Square D Co*, 445 Mich 153, 162; 516 NW2d 475 (1994). "[A] negligence action may be maintained only if a legal duty exists that requires the 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). A duty arises from a

special relationship between the plaintiff and the defendant such that the plaintiff entrusts himself to the control and protection of the defendant, who thereby assumes a legal obligation to act with due care for the benefit of the plaintiff. *Dykema v Gus Macker Enterprises, Inc*, 196 Mich App 6, 8-9; 492 NW2d 472 (1992). Such special relationships include common carrier-passenger, innkeeper-guest, employer-employee, landlord-tenant, and invitor-invitee. *Id.* at 8. Whether a duty exists is a question of law for the court to decide. *Graves, supra* at 492.

Premises liability is conditioned on possession and control of the property. *Merritt v Nickelson*, 407 Mich 544, 552; 287 NW2d 178 (1980). The duty owed by a landowner to a visitor depends on whether the visitor is an invitee, a licensee, or a trespasser. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). Plaintiffs, as customers on premises held open for a commercial purpose, were invitees. *Id.* at 607. “A premises owner owes, in general, 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.” *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 105; 689 NW2d 737 (2004), rev’d on other grounds 472 Mich 929 (2005). The defendant is liable for injuries resulting from unsafe conditions caused by his active negligence. *Hampton v Waste Mgt of Michigan, Inc*, 236 Mich App 598, 604; 601 NW2d 172 (1999). If otherwise caused, the defendant is liable if the unsafe conditions are known to him or existed for a sufficient length of time such that he should have known of them. *Id.*

Plaintiffs’ only claim of negligence stems from the duty that defendant, as an invitor, owed them as invitees to protect them from an unreasonably dangerous condition on the land, that being the pallet allegedly hidden under a box of watermelons. Plaintiffs’ allegations of ordinary negligence (placing the box on a single pallet instead of multiple pallets; using a natural wood instead of a brightly-colored pallet; failing to fold out the flaps on the box; failing to test the box-and-pallet display for general safety; failing to warn plaintiff of the box and pallet) seek to impose liability on defendant for having an unsafe condition in its store. Therefore, the trial court did not err in holding that the case sounded in premises liability only.

Premises liability rests on the duty an owner or occupier of land owes to those who enter to protect them from unreasonably dangerous conditions on the land. *Merritt, supra* at 551. 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 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, e.g., something unusual about the character, location, or surrounding conditions, make the risk of harm unreasonable. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614-617; 537 NW2d 185 (1995).

The trial court did not err in dismissing plaintiffs’ premises liability claim because the hazard was open and obvious and no special aspects existed. If the display appeared as it is depicted in the photographs taken by the merchandise manager, plaintiffs themselves would concede that the hazard was open and obvious. However, plaintiffs argue that the pallet was

completely hidden from view and that the display in the store that day looked nothing like the display depicted in the photographs. Assuming this to be true, as we must for purposes of summary disposition in light of the conflicting evidence, the hazard was nonetheless open and obvious. There was of course some type of base to the watermelon display that made contact with the floor in order to hold the display up, and any reasonable person with ordinary intelligence would realize such to be the case; therefore, placing one's foot below the expanded watermelon box was certainly going to result in contact with some obstacle. The display and hazard was open and obvious. Moreover, the hazard was not effectively unavoidable, nor was there a uniquely high likelihood of harm or a risk of serious injury or death despite the open and obvious nature of the hazard. Accordingly, no special aspects existed. See *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517-519; 629 NW2d 384 (2001) (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).

Affirmed.

/s/ William B. Murphy

/s/ Janet T. Neff