

STATE OF MICHIGAN
COURT OF APPEALS

MARK D. SUMERIX,

Plaintiff-Appellee,

v

FAMILY FARE, L.L.C., d/b/a GLENS'
MARKET,

Defendant-Appellant.

UNPUBLISHED

July 25, 2006

No. 260382

Crawford Circuit Court

LC No. 04-006325-NO

Before: Neff, P.J., and Bandstra and Zahra, JJ.

PER CURIAM.

In this premises liability case, defendant appeals by leave granted the trial court's order denying defendant's motion for summary disposition under MCR 2.116(C)(10). We reverse and remand for entry of an order granting summary disposition in favor of defendant. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant alleged below that it is not liable for the injuries sustained by plaintiff while he was shopping in defendant's grocery store because the dangerous condition that caused the injury was open and obvious. Specifically, defendant contended that the reddish-brown liquid which caused plaintiff to slip and fall while walking down one of the store aisles was visually distinguishable from the off-white tile flooring and that the substance trailed from the point where plaintiff fell in the middle of one aisle into another aisle. The trial court denied defendant's motion for summary disposition without first determining if the dangerous condition was open and obvious. Instead, the trial court, relying on *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001), concluded that there was a genuine issue of material fact regarding whether defendant knew or should have known of the dangerous condition.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Stevenson v Reese*, 239 Mich App 513, 516; 609 NW2d 195 (2000). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* When reviewing a motion for summary disposition under MCR 2.116(C)(10), we consider affidavits, pleadings, depositions, admissions, and documentary evidence submitted by the parties in a light most favorable to the nonmoving party. *Id.* Summary disposition is appropriate when there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Id.*

A premises possessor owes a duty to invitees to exercise reasonable care to protect the invitees from an unreasonable risk of harm caused by a dangerous condition that the invitor knows or should know the invitees will not discover, realize, or protect themselves against. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). A premises possessor is not, however, required to protect invitees from open and obvious dangers. *Id.* at 517. In determining whether a condition is open and obvious, the fact-finder must employ an objective standard. *Mann v Shusteristic Enterprises, Inc*, 470 Mich 320, 329; 683 NW2d 573 (2004). Specifically, the test is whether an average user with ordinary intelligence would have been able to discover the danger and risk presented upon casual inspection. *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002).

Here, the trial court improperly failed to determine whether the condition that caused plaintiff's injuries was open and obvious before denying defendant's motion for summary disposition. Even when viewed in a light most favorable to plaintiff, the evidence clearly showed that the reddish-brown substance on the floor of defendant's grocery store was readily distinguishable from the off-white floor tiles, with plaintiff himself identifying the condition after his fall. Plaintiff admitted that he did not look down at the floor or in front of him as he progressed through the aisles, instead directing his attention only to the merchandise on the shelves. The fact that plaintiff failed to see the reddish-brown substance until after he fell is irrelevant: a reasonably prudent person would have looked where they were going, observed the substance, and taken appropriate care for their own safety. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 616; 537 MW2d 185 (1995). Where the substance created a risk of harm solely because plaintiff failed to notice it, the open and obvious doctrine eliminates liability if plaintiff should have discovered it and realized its danger. *Id.* at 611.

Further, even assuming that the dangerous condition was not open and obvious, the trial court erred in denying defendant's motion for summary disposition because no genuine issues of material fact existed regarding whether defendant had actual or constructive notice of the reddish-brown substance in its grocery aisle. A storekeeper has a duty to provide reasonably safe aisles for customers and is liable for injury resulting from an unsafe condition caused where the unsafe condition is known to the storekeeper or where the unsafe condition is of such a character or has existed for such a sufficient length of time that the storekeeper should have had knowledge of it. *Clark, supra* at 419.

There is nothing in the record to indicate that defendant knew about the unsafe condition or that the unsafe condition was of such a character or had existed for such a sufficient length of time that defendant should have had knowledge of it. Regarding the character of the reddish-brown substance, which was apparently comprised of chicken blood and juices that leaked from a package of chicken onto the floor, there was no evidence that the aisles of defendant's store tended to have this reddish-brown substance leaked onto its floors regularly or that defendant routinely dealt with such a condition. Regarding the length of time the reddish-brown substance had been on the floor, although shopping cart tracks had allegedly been made through the substance, there was no evidence suggesting the time frame over which the tracks were made. Indeed, plaintiff testified at his deposition that the substance on the floor was a "mess," indicating that it was still in liquid form and had yet to dry, thus implying that the substance had been spilled relatively recently. Viewing the evidence in a light most favorable to plaintiff, no genuine issues of material fact exist to warrant trial on plaintiff's negligence claims.

We reverse and remand for entry of an order granting summary disposition in favor of defendant. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Richard A. Bandstra
/s/ Brian K. Zahra