

STATE OF MICHIGAN
COURT OF APPEALS

THE ESTATE OF NEIL REXFORD BRUNETT,
Deceased, by KRISTINE M. GRUSE, Personal
Representative,

UNPUBLISHED
July 11, 1997

Plaintiff-Appellant,

v

EVART PRODUCTS COMPANY,

No. 194382
Osceola Circuit Court
LC No. 94-006595 NI

Defendant-Appellee.

Before: Cavanagh, P.J., and Doctoroff and D.A. Teeple*, JJ.

MEMORANDUM.

Plaintiff appeals by right summary disposition under MCR 2.116(C)(10) in favor of defendant in this premises liability action. This case is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, plaintiff purports to rely on the affidavit of an expert concerning the duties of the defendant to have employees present when a delivery was being made by a third party such as plaintiff's decedent. Duty, however, is a question of law, not of fact. *Moning v Alfono*, 400 Mich 425; 254 NW2d 759 (1977). Furthermore, to the extent that the expert's opinion relies on defendant's past practices or usages of trade, such matters do not establish the existence of a duty, which is fixed by law without regard to private rules of a party or customs of trade. *McKernan v Detroit Citizens Street Railway Co*, 138 Mich 519, 530; 101 NW 812 (1904) (per Hooker, J., adopted by the full Court 138 Mich at 524).

The dangers in this case were clearly open and obvious. The downward slope of the area fronting the loading dock was both common and plainly visible, and thus the hazard which befell plaintiff's decedent, attributable to parking his truck with a gap between the rear of the flatbed and the edge of the loading dock, without securing the brakes or chocking the wheels, was open and obvious to a reasonable person of average intelligence, particularly one as familiar with the premises as decedent.

* Circuit judge, sitting on the Court of Appeals by assignment.

Bertrand v Alan Ford, Inc, 449 Mich 606; 537 NW2d 185 (1995). Whatever danger arose from the situation was created by decedent himself after gaining access to the premises, after learning that there were no employees or agents of defendant present. Where plaintiff intentionally commits an act that brings about an injury, the risk of which was increased by the defendant's negligence, the plaintiff ordinarily loses any cause of action he might have because of defendant's negligence. *Hickey v Zezulka (On Resubmission)*, 439 Mich 408, 448 (1992). On these facts, no basis for imposing tort liability on defendant can be established.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Martin M. Doctoroff
/s/ Donald A. Teeple