STATE OF MICHIGAN

COURT OF APPEALS

KEVIN JENNINGS and SUSAN JENNINGS,

Plaintiffs-Appellants,

v

MCDONALD'S RESTAURANTS OF MICHIGAN, INC.,

Defendant-Appellee.

UNPUBLISHED
July 28, 2000

No. 218856
Kent Circuit Court
LC No. 98-000297-NO

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

PER CURIAM.

In this premises liability case, plaintiffs appeal as of right from an order of the circuit court granting summary disposition in favor of defendant. We reverse.

I

Plaintiff Kevin Jennings ("Jennings") and two acquaintances were at a McDonald's restaurant. Jennings leaned against or sat upon a bike rack located on the sidewalk near the entrance to the restaurant. The bike rack was not secured to the sidewalk. The bike rack tipped backwards, and Jennings fell, fracturing his wrist and lacerating his leg.

Jennings brought suit against defendant, claiming defendant improperly installed the bike rack, failed to warn him of the bike rack's dangerous condition, and installed an improperly designed bike rack. Defendant moved for summary disposition under MCR 2.116(C)(8) and (10). The circuit court granted the motion on two bases. First, the court concluded that defendant did not know and should not have known that the bike rack was a dangerous condition. The court reasoned that, despite the landowner's duty to inspect, a landowner could not reasonably anticipate that patrons would misuse the bike rack by leaning against it. Second, the court concluded that plaintiff should have been aware of the bike rack's dangerous condition with regard to leaning against it because it was open and obvious.

This Court reviews a motion for summary disposition de novo. *Arias v Talon Development Group, Inc,* 239 Mich App 265, 266; 608 NW2d 484 (2000). A motion brought under MCR

2.116(C)(10) tests the factual support for a claim. *Id.* A court must determine whether the evidence presented fails to establish a genuine issue of material fact, entitling the movant to judgment as a matter of law. *Id.* "A court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence available to it." *Weakley v Dearborn Heights,* 240 Mich App 382, 384; ___ NW2d ___ (2000).

II

First, plaintiffs argue that the circuit court erred in granting summary disposition in favor of defendant because defendant knew or should have known that the bike rack was dangerous. Although there was no evidence that defendant actually knew of the dangerous condition of the bike rack, we agree with plaintiffs' argument that defendant should have known about its dangerous condition.

This Court recognizes that "a premises owner has a duty to exercise reasonable care to protect invitees, i.e., persons who enter the premises at the owner's express or implied invitation to conduct business concerning the owner, from an unreasonable risk of harm caused by a dangerous condition of the land that the owner knows or should know the invitees will not discover, realize, or protect themselves against." *Butler v Ramco-Gershenson, Inc,* 214 Mich App 521, 532; 542 NW2d 912 (1995). The premises owner is required to inspect the premises to discover possible defects. *Id.* at 535.

This Court considers only whether plaintiffs produced enough evidence to survive the motion for summary disposition. We find that they did. Plaintiffs provided the testimony of an expert witness, a county director of parks and recreation, that defendant should have realized the bike rack needed to be stabilized. Plaintiffs' expert also testified that this could easily be done with cement or by inserting a pole behind the bike rack so that it could not tip backwards.

Plaintiffs also provided evidence that defendant could have discovered the bike rack's dangerous condition during an inspection. An acquaintance of Jennings testified that, after the accident, he set the bike rack back up and pushed on it to show a McDonald's employee what happened. The acquaintance stated that it took "[s]urprisingly little" force for the bike rack to fall backwards. The managing partner of the McDonald's also testified that he knew that the bike rack was not bolted down or secured in any way.

We find that defendant should have anticipated the possibility that someone would lean or sit on the bike rack, located just outside the entrance. The evidence also supports a conclusion that a reasonable inspection of the premises would have revealed that the bike rack would easily tip. Thus, we hold that plaintiffs presented evidence creating a genuine issue of material fact regarding whether defendant should have known of the dangerous condition, and the circuit court erred when it granted summary disposition on this basis as a matter of law.

III

Next, plaintiffs argue that the circuit court further erred when it granted summary disposition for defendant, concluding that the bike rack's dangerous condition was open and obvious to plaintiff. Again, we agree.

This Court has reiterated that "if the particular activity or condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger." *Millikin v Walton Manor Mobile Home Park, Inc,* 234 Mich App 490, 498; 595 NW2d 152 (1999), quoting *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995). "The test for an open and obvious danger is whether 'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.'" *Abke v Vandenberg*, 239 Mich App 359, 361-362; 608 NW2d 73 (2000), quoting *Novotney v Burger King Corp (On Remand),* 198 Mich App 470, 475; 499 NW2d 379 (1993). "Thus, we look not to whether plaintiff should have known [of the dangerous condition], but to whether a reasonable person in his position would foresee the danger." *Hughes v PMG Building, Inc,* 227 Mich App 1, 11; 574 NW2d 691 (1997).

Additionally, "the analysis whether a danger is open and obvious does not revolve around whether steps could have been taken to make the danger more open or more obvious. Rather, the equation involved is whether the danger, as presented, is open and obvious." *Novotney*, *supra,* 474-475. It is irrelevant whether the plaintiff actually saw the danger. *Id.* at 475. Instead, the consideration is whether an ordinary user would discover the danger upon casual inspection. *Id.* Moreover, the presentation of photographs and testimony that the dangerous condition was not observed by the plaintiff will not create a genuine issue of material fact. *Weakley, supra* at 2-3; *Millikin, supra* at 498-99.

We find that plaintiffs presented evidence to survive a motion for summary disposition. Jennings' acquaintances both testified that, before the accident, they leaned on the bike rack and were surprised when it began to tip backwards. The managing partner of McDonald's also testified that it was hard to visually determine the weight of the bike rack and that by looking at it, one would be unable to determine if it would tip over.

We hold that this evidence created a genuine issue of material fact concerning the open and obvious nature of the bike rack's dangerous condition. We therefore find that the circuit court erred when it granted summary disposition for defendant.[1]

Reversed.

/s/ Gary R. McDonald
/s/ Janet T. Neff
/s/ Brian K. Zahra

[1] Because we conclude that the bike rack's dangerous condition was not open and obvious, we do not reach plaintiffs' remaining issue whether defendant is nevertheless liable for an open and obvious danger where the risk of harm is foreseeable.