STATE OF MICHIGAN

COURT OF APPEALS

KURT WINNINGHAM,

Plaintiff-Appellant,

v

DAVID J. ROBERTSON, d/b/a ROBERTSON & SONS WELL DRILLING, and WILLIAM J. ESPER, AGNES C. ESPER, WILLIAM J. ESPER TRUST, and AGNES C. ESPER TRUST,

Defendants-Appellees.

UNPUBLISHED
July 31, 2001

No. 223078
Macomb Circuit Court
LC No. 98-004518-NO

Before: Bandstra, C.J., and White and Collins, JJ.

PER CURIAM.

Plaintiff Kurt Winningham ("plaintiff") appeals as of right from the order granting summary disposition to defendants David J. Robertson ("Robertson") and William J. Esper, Agnes C. Esper, William J. Esper Trust, and Agnes C. Esper Trust (collectively, "the Esper defendants"). We reverse and remand.

Plaintiff and his family were tenants in a farmhouse owned by the Esper defendants. Sometime in February or early March 1998, the well pump on the property stopped functioning, causing the house to be without water. The Esper defendants hired Robertson, a well driller with twenty years' experience, to service the pump. Robertson determined that the problem was in the underground electrical line that supplied power to the pump and was able to alleviate the immediate problem by bypassing the underground wire and running a temporary electrical line from the house to the pump. Robertson ran the cord out through the basement window and along the ground to the well pit, through an area accessible by plaintiff's chained labrador retriever. Robertson did not bury the line because the ground was frozen at the time. A few days later, plaintiff's dog chewed through the line and, although the dog was not electrocuted, the pump was again disabled. Robertson was once again summoned, but, in the interim, and while the circuit breaker was tripped, plaintiff spliced the individual wires back together according to their color coding. Over the following months, neither Robertson nor Esper buried the line. One evening in July 1998, plaintiff was weed whipping near the line and attempted to move the line by his ordinary custom of gripping it on either side of the splice, so that it would not pull apart. In doing so, plaintiff received a severe electrical shock.

Plaintiff filed a complaint under various theories of negligence and nuisance, alleging, among other things, that he had suffered injuries that impaired his ability to perform his job as a bricklayer. The trial court granted summary disposition, pursuant to MCR 2.116(C)(10), to Robertson and the Esper defendants on the basis that the hazard by which plaintiff was injured was open and obvious, and because plaintiff's own negligence had created the condition.[1]

On appeal, plaintiff argues that: (1) although he was the one who made the splice and left the wires bare and exposed, the danger posed by the exposed electric wires was not open and obvious to the extent that he could not determine, upon casual inspection, that the line carried 220 volts of electricity; (2) even if the danger from the line was open and obvious, it was still unreasonably dangerous and the Esper defendants had a duty to undertake reasonable precautions to make this condition safe; and (3) even if plaintiff's negligence contributed to the hazard, that did not justify granting summary disposition to others whose negligent acts or omissions were substantial causes of his injuries.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). On a motion brought pursuant to MCR 2.116(C)(10), "[t]he court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed in the action to determine whether a genuine issue of any material fact exists to warrant a trial." *Id.* On appeal, as below, all reasonable inferences are drawn in favor of the nonmoving party. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995).

Premises owners have a duty to protect invitees from possible injury by exercising due care and maintaining their property in a reasonably safe condition. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 90; 485 NW2d 676 (1992). However, no duty is owed where the dangers are known or are open and obvious unless the risk of injury remains unreasonable in spite of knowledge and obviousness. *Bertrand, supra* at 611. In other words, as recently stated by the Supreme Court:

> [T]he general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk. [*Lugo v Ameritech Corp, Inc*, ___ Mich ___; ___ NW2d ___ (Docket No. 112575, decided 7/3/2001), slip op at 4.]

Whether a danger is open and obvious depends upon whether it is reasonable to expect an average user with ordinary intelligence to discover the danger upon casual inspection. *Novotny v Burger King Corp (On Remand),* 198 Mich App 470, 475; 499 NW2d 379 (1993).

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[1] We are unable to glean from the record the court's basis for disposing of plaintiff's claim alleging a nuisance. Because plaintiff has not raised the issue on appeal, we need not address the issue here.

Drawing all reasonable inferences from the submitted evidence in plaintiff's favor, we conclude that the circuit court properly determined that the danger posed by the exposed splice was open and obvious. It is undisputed that plaintiff was aware that there was an electrical line with an exposed splice that provided power to the well pump and which ran along the ground from his house to the well pit. Further, plaintiff acknowledged that he understood that electrical wires can be dangerous. Plaintiff contends, however, that because he was not aware that the exposed line carried 220 volts of electricity and he presented evidence that it is not possible for an average person with ordinary intelligence to determine by casual inspection the voltage level of an electrical line, the danger presented by the exposed splice was not open and obvious.

Whether an average user with ordinary intelligence would appreciate the *degree* of harm associated with a particular exposed electrical line is not a factor in determining whether the danger was open and obvious. See *Glittenberg v Doughboy*, 441 Mich 379, 401-402; 491 NW2d 208 (1992). The obvious risk of exposed electrical wires, whatever the voltage, is an electric shock. Plaintiff acknowledged this danger by placing a ceramic bowl over the open wire, as he explained, to "keep the rain off," "[o]r anybody walking by." "When such a risk is objectively determinable, warnings that parse the risk are not required. The general danger encompasses the risk of the specific injury sustained." *Id.* at 400. Accordingly, we conclude that the circuit court properly determined that the danger presented by the exposed electrical wire was open and obvious.

However, we cannot conclude, as a matter of law, that the 220 volt line with an exposed splice lying on top of the ground in plaintiff's yard for approximately five months did not present an unreasonable risk of harm. The evidence in this case "creates a genuine issue of fact regarding whether there are truly 'special aspects' of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm . . . ." *Lugo, supra,* slip op at 5.

First, plaintiff put forth evidence that the exposed 220 volt line presented an unusual circumstance that involved a high risk of severe harm. *Lugo, supra,* slip op at 6-8. Plaintiff's expert averred that an exposed 220 volt line presents an extreme risk of potential injury or death, that the township used the National Electrical Code to govern the installation and maintenance of electrical systems, and that the code required that the 220 volt line be buried. Further, in light of evidence that plaintiff had the responsibility for keeping the lawn mowed and given the time of the year and the length of time that the line remained unburied, a trier of fact could reasonably conclude that the Esper defendants should have anticipated that plaintiff would need to move the unburied line at some point, and would proceed to encounter the risk. See *Bertrand, supra* at 612, quoting 2 Restatement Torts, 2d § 343A, comment f, p 220; see also *Lugo, supra,* slip op at 5-6. Indeed, plaintiff testified that he had moved the line on numerous occasions and not received a shock. Although William Esper testified that plaintiff declined an offer to bury the line and told him he would mow around it, plaintiff testified that he and his wife repeatedly asked that the line be buried.

We conclude, therefore, that although the danger posed by the unburied line was open and obvious, because a genuine issue existed regarding whether the unburied line presented an unreasonable risk of harm, summary disposition was inappropriate. *Bertrand, supra* at 624-625.

Finally, with regard to plaintiff's argument that the circuit court erred in dismissing his claims against Robertson and the Esper defendants on the basis that plaintiff was negligent in creating the hazard that caused his injuries, this Court has noted as follows:

> A defendant's negligent conduct will be considered a proximate cause if it is a substantial factor in causing the harm. Generally, when there are no policy considerations involved, the question whether an intervening act of negligence is a superseding cause relieving the defendant of liability is a question for the jury. [*Coy v Richard's Industries, Inc,* 170 Mich App 665, 669; 428 NW2d 734 (1988).]

Here, reasonable minds could differ regarding whether Robertson's or the Esper defendants' conduct was a cause, and whether plaintiff's conduct was a superseding cause, of plaintiff's injuries. First, under the terms of the lease, plaintiff was allowed to keep an outside dog. Plaintiff's dog had his own house and was on a chain, and the electrical line was run through the dog's range of territory. Further, the evidence conflicts regarding why the temporary line was never buried. William Esper testified that he informed plaintiff that the Esper defendants intended to install a completely new water system at the first opportunity, and that plaintiff turned down their offer to bury the temporary line in the meantime. Again, according to William Esper, plaintiff stated that he would simply mow around the line. By contrast, plaintiff testified that he was never informed of a plan to install a new water system, that William Esper never offered to bury the temporary line, that plaintiff offered to bury the line himself and was told not to, and that he and his wife repeatedly requested, to no avail, that the Esper defendants bury the line. Also, plaintiff averred at his deposition and in his affidavit that after he spliced the wires, he asked Robertson to look them over, and that Robertson told him he had repaired the line exactly as Robertson would have done and said that it was safe to turn the power back on. Further, plaintiff testified at deposition that Robertson had promised to come back and bury the line. However, Robertson testified that he was not hired to bury the line and that when he went to the home after the pump stopped working because the dog chewed through the line, plaintiff told him he had fixed the line and his services were not needed.

Because there exists a material question of fact regarding whether plaintiff's negligence was an intervening and superseding cause of his own injuries, the court erred by granting summary disposition on that basis. Rather, the court should have permitted the trier of fact to apportion responsibility according to the comparative negligence of the parties. See *Jennings v Southwood*, 446 Mich 125, 131; 521 NW2d 230 (1994).

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Helene N. White
/s/ Jeffrey G. Collins