STATE OF MICHIGAN

COURT OF APPEALS

JOHN BARRETT,

Plaintiff-Appellant,

v

DISCOUNT TIRE & BATTERY,

Defendant-Appellee.

UNPUBLISHED
August 26, 2004

No. 250213
Montcalm Circuit Court
LC No. 02-001469-NO

Before: Whitbeck, C.J., and Owens and Schuette, JJ.

PER CURIAM.

Plaintiff John Barrett appeals as of right from a judgment granting defendant Discount Tire & Battery's motion for summary disposition under MCR 2.116(C)(10). We reverse.

I. Basic Facts and Procedural History

Barrett slipped and fell on a floor jack handle in a garage on property owned by Discount Tire. Barrett's deposition stated that he was returning to his vehicle after it had been serviced when he tripped over the jack handle, which was sticking out approximately two feet from the rear of a vehicle located in the service bay next to Barrett's truck. While Barrett testified that the handle was the same gray color as the cement floor of the garage, this fact was disputed by the deposition testimony of a Discount Tire employee who stated that though the color may fade with age, all jack handles in the garage are either white or yellow. The trial court granted defendant's motion for summary disposition, finding the condition open and obvious as a matter of law.

II. Standard of Review

On appeal, Barrett argues that the trial court erred in granting defendant's motion for summary disposition because whether the condition was open and obvious is a question of fact for the jury to decide. We consider a trial courts' grant of summary disposition de novo.[1] When reviewing a motion for summary disposition, the affidavits, pleadings, depositions, admissions,

[1] *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

and documentary evidence submitted by the parties will be considered in the light most favorable to the nonmoving party.[2]

III. The Open and Obvious Doctrine

In general, a premises owner owes 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.[3] This duty, however, does not generally encompass removal of open and obvious dangers.[4] Whether a danger is open and obvious depends on whether it is reasonable to expect that "an average person with ordinary intelligence would have discovered the danger upon casual inspection."[5] Where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, "the invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee."[6] "In sum, the 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."[7]

Discount Tire argues that the jack handle was an open and obvious condition because the handle was sticking out two feet behind the vehicle. As a result of this distance, Discount Tire contends that an average person upon casual inspection of the area would have noticed the jack handle and been able to avoid it. However, the distance that an object is protruding into a plaintiff's walking area is not necessarily determinative of whether the condition is open and obvious as a matter of law. For example, in *Dunkle v Kmart*, this Court held that a wood pallet sticking two feet into the aisle of the store was not an open and obvious condition as a matter of law.[8] In that case, there were boxes stacked on the pallets seemingly in line with the merchandise of the aisle and the plaintiff tripped as he turned the corner into the aisle.[9] Although this opinion is not binding because it is unpublished,[10] we find its reasoning persuasive.

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[2] *Stevenson v Reese*, 239 Mich App 513, 516; 609 NW2d 195 (2000).

[3] *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001).

[4] *Id.*

[5] *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993).

[6] *Id.*, quoting *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992).

[7] *Lugo, supra* at 517.

[8] *Dunkle v Kmart (On Remand)*, unpublished opinion per curiam of the Court of Appeals, decided August 26, 2003 (Docket No. 218789).

[9] *Id.*

[10] MCR 7.215(c)(1).

Discount Tire also argues that the jack handle was open and obvious because it was painted either yellow or white. However, Barrett testified in his deposition that the handle of the jack was the same gray color as the cement floor, making it extremely difficult to see. Although this assertion was contradicted by Discount Tire employees who testified that their jack handles were all either white or yellow, one employee conceded that as they age, the coloring may fade. Although a plaintiff's testimony concerning the open and obvious question can be strengthened by corroborating testimony or photographic evidence,[11] this Court has found that deposition testimony, though unsupported, may create a genuine issue of material fact for a jury to decide.[12] In this case, Barrett not only stated that the handle was the same color as the cement floor, but that when he returned to the establishment after the accident, many things were yellow in color that were not yellow at the time of the accident. Viewing this evidence in the light most favorable to plaintiff, we conclude that there was a genuine issue of material fact because, if the jury believes Barrett's testimony, it could reasonably find that the handle was not an open and obvious condition.

Finally, Discount Tire analogizes the jack handle in this case to the pothole found to be an open and obvious condition in the *Lugo* decision. However, the Court in *Lugo* clearly placed significance on the fact that had the plaintiff been looking down and paying attention, she would have seen the pothole.[13] In the instant case, by contrast, Barrett stated in his deposition that he was looking down in an effort to avoid any tools that may have been on the floor of the garage. While the open and obvious doctrine uses an objective standard that is not based merely on what the plaintiff himself observed, the fact that Barrett did not see the handle despite looking down may lead the jury to believe that a reasonable person upon casual inspection also would not have seen the handle.

In sum, the fact that Barrett testified that the handle was sticking out two feet, was the same color as the cement floor, and he fell even though he was looking down in an effort to avoid tools, created a genuine issue of material fact as to whether the protruding jack handle was an open and obvious condition. Therefore, we conclude that the trial court erred in granting defendant's motion for summary disposition.

Reversed.

/s/ William C. Whitbeck
/s/ Donald S. Owens

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[11] See *Forest Wolfrom v Hillcrest Memorial*, unpublished opinion per curiam of the Court of Appeals, decided February, 12, 2002 (Docket No. 204746), finding a genuine issue of material fact and reversal of summary disposition where an expert witness corroborated plaintiff's testimony that a particular gray step was difficult to distinguish from the surrounding area.

[12] See *Avias v Talon Development Group* 239 Mich App 265, 608 NW2d 484 (2000), reversing summary disposition where plaintiff testified that she slipped on a ramp outside the credit union that was painted while she was inside the building.

[13] *Lugo, supra* at 521.