STATE OF MICHIGAN

COURT OF APPEALS

JOHN BARRETT,

Plaintiff-Appellant,

v

DISCOUNT TIRE & BATTERY,

Defendant-Appellee.

UNPUBLISHED
August 26, 2004

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

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

SCHUETTE, J. (*dissenting*).

I respectfully dissent from the majority's conclusion that the trial court erred in granting defendant Discount Tire & Battery's motion for summary disposition under MCR 2.116(C)(10). I agree with the trial court that there was no genuine issue of material fact because reasonable minds could not differ that the protruding jack handle was open and obvious. I would affirm.

The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it for himself. *Bertrand v Alan Ford, Inc,* 449 Mich 606, 609; 537 NW2d 185 (1995). The open and obvious danger doctrine attacks the duty element that a plaintiff must establish in a prima facie negligence case. *Id.* at 612. 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. *Novotney v Burger King Corp (On Remand),* 198 Mich App 470, 474-475; 499 NW2d 379 (1993). This test is objective, and this Court "look[s] not to whether plaintiff should have known that the [condition] was hazardous, but to whether a reasonable person in his position would foresee the danger." *Hughes v PMG Bldg., Inc.,* 227 Mich App 1, 11, 574 NW2d 691 (1997). "In deciding summary disposition motions by premises possessors in "open and obvious" cases, courts should focus on the objective nature of the condition of the premises at issue, not of the subjective degree of care used by the plaintiff." *Lugo v Ameritech Corp, Inc,* 464 Mich 512, 523-524; 629 NW2d 384 (2001).

The majority argues "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. *Lugo, supra* at 521." The majority then used this interpretation of *Lugo* to distinguish this case, contending that the fact that Barrett did not see the handle despite looking down creates a

genuine issue of material fact that a reasonable person upon casual inspection also would not have seen the jack. Specifically, the *Lugo* Court stated:

> [P]laintiff argues that the pothole was filled with debris, the evidence presented to the trial court simply does not allow a reasonable inference that the pothole was obscured by debris at the time of plaintiff's fall. Indeed, plaintiff's testimony at her deposition was that she did not see the pothole because she "wasn't looking down," not because of any debris obscuring the pothole. *Id.*

Thus, in my view, the *Lugo* Court did not emphasize that the plaintiff would have seen the pothole had she been looking down, rather the Court concluded the plaintiff could not make an argument at trial based on the status of debris on the pothole because she had not been looking down at the time of her fall. Of more importance to the analysis of this issue is the *Lugo* Court's comment:

> While we agree with the result reached by the trial court, we consider it important to disapprove part of its apparent rationale. The trial court's remarks indicate that it may have granted summary disposition in favor of defendant because the plaintiff "was walking along without paying proper attention to the circumstances where she was walking." However, in resolving an issue regarding the open and obvious doctrine, the question is whether the *condition of the premises* at issue was open and obvious and, if so, whether there were special aspects of the situation that nevertheless made it unreasonably dangerous. *Id.* at 523 [emphasis in original]

In light of this explanation, I focus my analysis on the objective condition of the garage and on whether an "ordinarily prudent" person would have seen the jack, not on the subjective matter of where Barrett was looking or whether he actually saw the jack. *See Bertrand, supra* at 615. I would find that an ordinarily prudent person would typically be able to see a two foot long jack protruding from beneath a car at an auto garage upon casual inspection and avoid it.[1] Just because a particular plaintiff fails to see a potential hazard does not mean it is not open and obvious. *Id.* at 621. Further, I would note, as did the *Lugo* Court in its discussion of potholes, that there is little risk of severe harm. Unlike falling an extended distance, it cannot be expected that a typical person tripping on a jack and falling to the ground would suffer severe injury. *Lugo, supra* at 520.

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[1] I am not persuaded that the color of the jack is material given its large size, shape and location. In its discussion of the dispute over the color of the jack, the majority bolsters its assertion that an issue of fact remains with the statement: "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." I believe that this is testimony regarding subsequent remedial measures. MRE 407 provides that such evidence is not admissible to prove negligence or culpable conduct in connection with an event.

Additional case law supports a determination that the condition in this case was open and obvious. In *Ghaffari v Turner Const Co*, 259 Mich App 608, 614-615; 676 NW2d 259 (2003), the plaintiff was injured when he slipped and fell on some pipes on the floor of a construction site. This Court upheld the trial court's finding that the pipes on the floor presented an open and obvious condition. *Id.* at 614. This Court noted that it would be unreasonable to expect every piece of construction material and equipment to be stored neatly on shelves during a construction project involving multiple subcontractors and concluded that reasonable minds could not differ in finding the danger to be open and obvious. Id. at 614-615. Likewise, it would be unreasonable to expect a bustling service station to keep all its tools and equipment off the floor.

Another relevant case is *Corey v Davenport College of Business*, 251 Mich App 1, 649 NW2d 392 (2002), wherein the plaintiff was injured after slipping and falling on snowy and icy college dormitory steps. *Id*. at 1. The trial court granted summary disposition to defendant. This Court originally reversed and remanded that decision; however, in lieu of granting leave to appeal, our Supreme Court remanded the case back to this Court. Upon remand, this Court affirmed the trial court's grant of summary disposition. This Court held that the plaintiff was a reasonable person who recognized the snowy and icy condition of the steps and the danger the condition presented and concluded that the condition was open and obvious. *Id*. at 5. The *Corey* Court relied on the rationale employed by this Court in *Joyce v Rubin* 249 Mich App 231; 642 NW2d 360 (2002).[2] The *Joyce* Court determined that the plaintiff was "undoubtedly aware" of the snowy and icy condition of the sidewalk and the danger of slipping before she fell. *Id.* at 239-240. Similarly, here Barrett admitted that he was aware that there were various tools scattered on the floor of the service station and was aware that he could trip over such tools.

Given my determination that the jack was an open and obvious condition, I must address whether the jack nonetheless presented an unreasonably dangerous risk such that the landowner had a duty to undertake reasonable precautions to protect the plaintiff. *Joyce, supra* at 240-243. Similar to the pothole in the *Lugo* case, the jack in this case was neither "effectively unavoidable" nor did it "impose an unreasonably high risk of severe harm" to plaintiff. *Lugo, supra* at 518. Had Barrett seen the handle, other avenues to his vehicle were available. Additionally, while the jack may cause one to trip, it does not pose any more of a risk of severe harm than the pothole discussed in *Lugo.*

I would find the trial court correctly determined that reasonable minds could not differ on whether any danger posed by the jack was open and obvious. Any danger posed by the jack, even if it were gray and a similar color to the ground below, was open and obvious to the average person of ordinary intelligence. Further, I would find that the jack did not present an unreasonably dangerous risk.

I would affirm.

/s/ Bill Schuette

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[2] This case involved a grant of summary disposition in favor of the defendant in a slip and fall accident on a homeowner's snowy walkway. This Court upheld the lower court.