

STATE OF MICHIGAN
COURT OF APPEALS

PAULA ZELENKO, Personal Representative of
the Estate of RICHARD PRINE, Deceased,

Plaintiff-Appellant,

v

DAVID STITES,

Defendant-Appellee.

UNPUBLISHED
November 29, 2005

No. 254691
Genesee Circuit Court
LC No. 02-074918-NO

Before: Fort Hood, P.J., and White and O'Connell, JJ.

WHITE, J. (*dissenting*).

The circuit court recognized that plaintiff sought recovery on both premises liability and general negligence theories, and granted summary disposition as to both. The majority does not address the claims separately. I conclude that there were questions of fact as to each.

As to the premises liability claim, the proper inquiry is not “whether the danger presented by cutting trees with a chainsaw, and without a hardhat, was well-known,” but, rather, whether the dangerous condition was open and obvious, *Laier v Kitchen*, 266 Mich App 482, 487-490; 702 NW2d 199 (2005), i.e., whether the dead tree branch in proximity to the tree being cut was readily observable to a person of average intelligence upon casual inspection. Because the sole basis for the circuit court’s dismissal of plaintiff’s premises liability claim was that the danger of the activity, rather than the condition, was open and obvious, I would reverse.

As to the general negligence claim, there was evidence sufficient to create a question of fact whether defendant was negligent. That defendant may also have failed to exercise due care for his own safety, and plaintiff’s decedent may have been negligent as well, does not defeat this claim.

/s/ Helene N. White