STATE OF MICHIGAN

COURT OF APPEALS

JASON CHURCHILL,

Plaintiff-Appellant,

v

DAVID FERRY and SHAWNA FERRY,

Defendants-Appellees.

UNPUBLISHED
July 14, 2009

No. 285991
Genesee Circuit Court
LC No. 07-085935-NI

Before: O'Connell, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition in this premises liability case. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was injured when he fell from defendants' ladder as he was removing gutters from defendants' house. The ladder was made of wood and had square-cut ends; that is, it did not have angled feet but would be standing on an edge when used. Although this meant it would dig into a grass or dirt surface, providing grip for the base, when plaintiff used it on defendants' wooden deck there was nothing to keep the feet from slipping. The theory underlying plaintiff's suit was that plaintiff was an invitee, and that the combination of the ladder and the deck was a hidden danger against which defendants failed to warn or take precautions to protect him. Plaintiff alleged that defendants had special knowledge, due to experience, that the interaction of the wooden deck and the footless ladder involved an unreasonable risk of harm.

Defendants moved for summary disposition, asserting first that they owed plaintiff no duty because there was no evidence of a relationship giving rise to a duty. In the alternative, defendants argued that if they did owe plaintiff a duty it was that owed a licensee: to warn of known, hidden dangers if plaintiff could not have discovered them himself. The dangerous condition, that the ladder lacked rubber footings, was readily apparent to plaintiff but he chose to use the ladder on the deck anyway. Thus, defendants argued, even if they owed plaintiff a duty, there was no evidence showing they breached it in any way.

The trial court found that even if plaintiff was an invitee, defendants had no duty to plaintiff because there was no evidence to indicate that they instructed plaintiff on which ladder to use, that defendants even told plaintiff to go get the ladder, that defendants knew plaintiff was

going to use that ladder on the deck at the time he did, or that defendants knew there was a danger to using that ladder on the deck.

We review de novo a trial court's decision to grant or deny a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the non-moving party must come forward with at least some evidentiary proof establishing that a genuine question of fact exists. *Id.* at 120-121; *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

"[A] premises owner must maintain his or her property in a reasonably safe condition and has a duty to exercise due care to protect invitees from conditions that might result in injury." *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 90; 485 NW2d 676 (1992). This includes a duty to warn of known defects that the visitor is unlikely to discover on his own. *Id*. at 91. "The mere existence of a defect or danger is not enough to establish liability." *Berry v J & D Auto Dismantlers, Inc*, 195 Mich App 476, 480; 491 NW2d 585 (1992) (citations omitted).

> [T]here is no duty to warn of open and obvious dangers unless the invitor anticipates harm to the invitee despite the invitee's knowledge of the defect. 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. The care required extends to instrumentalities on the premises that the invitee uses at the invitation of the premises owner. [*Eason v Coggins Mem Christian Methodist Episcopal Church*, 210 Mich App 261, 263-264; 532 NW2d 882 (1995) (citations omitted).]

The *Eason* Court reversed the trial court's grant of summary disposition in a premises liability suit arising from a defective ladder. *Id.* at 262. The *Eason* Court compared the ladder, which had collapsed because of a missing safety latch, to one in *Muscat v Khalil*, 150 Mich App 114, 125-126; 388 NW2d 267 (1986) (a negligent entrustment case), where this Court held that the absence of warning labels on an extension ladder did not constitute a defective condition. *Eason, supra* at 264-266. The *Eason* Court stated,

> The danger that an extension ladder might slip and telescope down because of inadequate bracing at its base, as happened in *Muscat*, is a danger readily apparent to persons of ordinary intelligence and experience. However, the fact that a safety latch is missing or malfunctioning creates a different, or at least an additional, danger that is not so obvious absent specific knowledge of the defect. [*Id.* at 265.]

Much of the evidence that plaintiff cites in his favor comes from his affidavit made after plaintiff's deposition was taken. However, a party may not create an issue of fact by asserting in an affidavit facts that are contrary to his earlier deposition testimony. *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480; 633 NW2d 440 (2001). Plaintiff said in his deposition that he did not remember who grabbed the ladder, which he said was brought out from the garage, nor could he remember how he and Ferry decided what he would work on in Ferry's absence. Ferry, on the other hand, testified that when he left, the ladder was still in the garage and he did not know that plaintiff would go on the roof in his absence. Moreover, one thing that is abundantly clear is that plaintiff alone placed the ladder on the deck. Further, although Ferry testified that he

would brace the ladder, use a piece of carpet under it, or get someone to hold it when using the ladder on the deck, Ferry apparently figured this out through use of common sense and an abundance of caution, and he testified that *the ladder had never slipped on him*. Thus, whatever other elements plaintiff's proofs may have established, there is no evidence that the ladder and the deck together comprised a "known defect[] that the visitor is unlikely to discover on his own." *Berry*, *supra* at 480. Therefore, even if plaintiff were considered an invitee, he has failed to establish that defendants violated their duty of due care.

Affirmed.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio