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UNPUBLISHED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
Genessee Circuit Court
LC No. 02-074918-NO

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

PER CURIAM.

In this premises liability action, plaintiff appeals by right from the order granting defendant's motion for summary disposition. We affirm.

This action arose from an accident which occurred while defendant and the decedent were cutting trees on defendant's property. The decedent was hit with a tree branch, which eventually led to his death. Plaintiff, the decedent's daughter, continued this suit as personal representative of his estate. The trial court granted defendant's motion for summary disposition, holding that the danger in cutting trees with a chainsaw was open and obvious.

On appeal, a trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition of all or part of a claim or defense may be granted when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10).

Generally, 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. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, this duty does not generally include the removal of open and obvious dangers. *Id.* If 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. *Id.*, quoting *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). Whether a particular danger is open and obvious depends on whether it is reasonable to expect an average user of ordinary intelligence to discover

the danger upon casual inspection. *Eason v Coggins Mem Christian Methodist Episcopal Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995).

Although case law principally addresses the open and obvious doctrine in the context of dangerous conditions, such as icy steps or holes in sidewalks, the doctrine has also been applied to dangerous activities. See *Benejam v Detroit Tigers, Inc*, 246 Mich App 645, 660-661; 635 NW2d 219 (2001) (ruling that the risk of being hit by a projectile from the playing field is open and obvious). Although plaintiff correctly argues that the particular tree branch that hit the decedent might not have been visible or discernible by casual inspection, this is not the proper inquiry. The proper inquiry is whether the danger presented by cutting trees with a chainsaw, and without a hardhat, was well-known. The dangerousness of using a chainsaw to cut down a tree, which then immediately falls to the ground, is well-known. It is also well-known that cutting a tree down may cause one of its branches to fall loose or become tangled with other branches. Therefore, the trial court did not err by granting defendant's motion for summary disposition because the danger presented in this situation was open and obvious to an average person with ordinary intelligence.

Plaintiff also argues, that even if the danger presented was open and obvious, special aspects existed which removed her case from the open and obvious doctrine.

Although a premises possessor has no duty to protect an invitee from open and obvious dangers, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to take reasonable precautions to protect invitees from that risk. *Lugo, supra* at 517. In other words, before this Court will remove the condition from the open and obvious danger doctrine, plaintiff must show that the condition's special aspects created a uniquely high likelihood of harm. *Id.* at 519.

Viewing all the evidence in the light most favorable to plaintiff by assuming defendant did not offer the decedent a hard hat and did not inspect the area for loose branches beforehand, plaintiff still did not produce evidence that these circumstances qualified as "special aspects." In *Lugo*, the Court ruled that special aspects may be created by an "unreasonable risk of harm." *Id.* at 518. The Court further stated that a condition that is "effectively unavoidable" creates an unreasonable risk of harm." *Id.* In this case, although the decedent's accident was unfortunate, it was not "effectively unavoidable." Defendant testified that at first he was cutting the trees down himself, but after the decedent retired and was looking for something to do, the decedent began coming over and helping him once or twice a month for half of the day. Defendant further testified that before he and decedent had cut any trees that morning, they looked at all of the trees, and noticed one with some dead branches. The decedent chose to cut that particular tree first because it was "a piece of cake" and he wanted to "start with an easy one." Defendant also testified that the decedent volunteered to cut the tree first, and told him to pick up the branches. Plaintiff never disputed this testimony. Given this evidence, the danger presented by that activity was not "effectively unavoidable," and therefore, did not pose a "uniquely high risk of harm." *Id*. at 519.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Peter D. O'Connell