

STATE OF MICHIGAN
COURT OF APPEALS

KENNETH MILLER,

Plaintiff-Appellant,

v

S M HONG ASSOCIATES, INC., d/b/a PRO-
CLEAN, INC.,

Defendant-Appellee.

UNPUBLISHED

May 10, 2012

No. 302016

Genesee Circuit Court

LC No. 09-091086-NO

Before: M.J. KELLY, P.J., and FITZGERALD and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition in this premises liability action. Because the trial court did not err by determining that there was no genuine issue of material fact that the drain cover that caused plaintiff's fall was open and obvious, we affirm.

While carrying a laundry basket at defendant's laundromat, plaintiff tripped and fell on a drain cover, that was slightly elevated and not flush with the floor. Plaintiff testified that he was holding the laundry basket straight out in front of his body, slightly above hip level, and did not see the drain cover before he fell. The trial court granted summary disposition for defendant on the basis that there was no genuine issue of material fact that the drain cover was an open and obvious condition. Plaintiff appeals the trial court's ruling.

We review de novo a trial court's decision granting on a motion for summary disposition. *Driver v Naini*, 490 Mich 239, 246; 802 NW2d 311 (2011). "We review a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007). Summary disposition under subrule (C)(10) is properly granted if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Id.* at 552.

Generally, a premises owner is liable for physical harm that a dangerous condition on his land caused to invitees if he knew about the condition or could have discovered it through the exercise of reasonable care, and if he should have realized that the condition created an unreasonable risk of harm. *Bertrand v Alan Ford, Inc.*, 449 Mich 606, 609; 537 NW2d 185 (1995). A landowner's duty to exercise reasonable care, however, does not extend to open and

obvious dangers. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). “Where the dangers are . . . so obvious that the invitee might reasonably be expected to discover them, an 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 McClouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). Courts utilize an objective test to determine whether a condition is open and obvious. *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 119-120; 689 NW2d 737 (2004) (GRIFFIN, J., dissenting), adopted in 472 Mich 929 (2005). A condition is open and obvious if “an ‘average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection.’” *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002), quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993) (brackets omitted). *Random House Webster’s College Dictionary* (2001) defines “casual” as “happening by chance,” “without definite or serious intention,” and “off hand.”

Applying these principles, the drain cover at defendant’s laundromat was an open and obvious condition, and defendant therefore owed plaintiff no duty to protect him from harm caused by the cover. The photographs of the drain cover that plaintiff took a few days after his fall show that the cover is elevated from the floor, is a different color than the surrounding floor, and is made of a different material than the surrounding floor. Although many of the photos were taken inches from the floor and clearly depict that the cover was not flush with the floor, one photo appears to have been taken from eye-level and illustrates that a person looking down at the floor while walking would have seen that the drain cover was elevated.¹ This is not a case in which the parties contest that which is depicted in the photographs. Rather, both parties acknowledge that the photographs accurately depict the condition. Thus, plaintiff’s own photographs demonstrate that an average person of ordinary intelligence would have been able to notice the cover with an “off hand” glance and “without definite or serious intention” to discover it. Further, plaintiff has presented no other documentary evidence, expert evidence, or lay opinion evidence addressing the objective nature of the condition on the premises.

Moreover, plaintiff testified that the lighting was adequate and that no light bulbs were out. No evidence indicates that he would have been unable to see the drain cover if he had been looking where he was walking. In fact, plaintiff testified that he would have been able to see the cover:

Q. Okay. Now, when you’re standing up looking down at the sewer cover, do you have any trouble seeing the sewer cover?

A. When I’m standing up?

Q. Yeah.

¹ In that photo, which plaintiff took a few weeks before his deposition, the drain cover was covered with duct tape. This is consistent with testimony indicating that duct tape was placed around the edge of the drain cover at some point after plaintiff’s fall. The outline of the raised drain cover is clearly visible through the duct tape.

A. If I know it's there, I wouldn't have a problem with seeing it.

The fact that plaintiff did not discover the condition does not mean that a reasonably prudent person would not have discovered the condition with a quick glance at the floor. In fact, Sydney Kreklau, a longtime patron of the laundromat, testified that the drain cover was not difficult to see, she had noticed it many times, and she could see the cover “sticking up above the floor” from a standing position. Sydney’s daughter, Karen Kreklau, similarly testified that she saw that the drain cover was “sticking up” from the floor.² Accordingly, the record shows that the condition itself, and any danger or risk associated with it, was readily noticeable to an “average user of ordinary intelligence . . . upon casual inspection.” *Joyce*, 249 Mich App at 238.

Plaintiff argues that *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997), provides the proper test to be applied in this case, which is “not . . . whether plaintiff should have known that [the condition] was hazardous, but . . . whether a reasonable person in his position would foresee the danger.” To that end, plaintiff contends that because most laundromat customers carry baskets of laundry in front of their bodies, obstructing the view of the floor, the hazard was not open and obvious to plaintiff because he was carrying a laundry basket and could not see the hazard. Plaintiff’s argument, rather than employing an objective test, improperly focuses on his subjective knowledge of the condition. In determining whether a condition is open and obvious, however, courts utilize an objective standard and consider the objective condition of the premises rather than the subjective degree of care used by the plaintiff. *Lugo*, 464 Mich at 523-524. Applying an objective test, a reasonable person in plaintiff’s position would have looked where he was walking, even while carrying a laundry basket, and would have been able to discover the drain cover upon casual inspection. In short, to rule that the hazard was not open and obvious because plaintiff did not see it because of circumstances unique to him would convert the open and obvious test from objective to subjective and run counter to established precedent. See, e.g., *Kenny*, 264 Mich App at 119-120 (GRIFFIN, J., dissenting), adopted in 472 Mich.

Plaintiff also argues that the condition was not open and obvious because Teresa Edwards, defendant’s employee, testified that she had never noticed that the drain cover was raised. Because the open and obvious test is an objective one, the testimony of a witness’s subjective impression, while evidence that a court may consider, is not dispositive of whether a condition is open and obvious. In any event, although Edwards never noticed that the drain cover was elevated, she also testified that nobody else had tripped on the drain cover during the nine years she had worked at the laundromat. Further, both Sydney Kreklau and Karen Kreklau testified that they had been coming to the laundromat for years and had noticed the drain cover many times. Sydney noticed it the first time that she used the restroom because the restroom is located around the corner from the drain cover, and Karen testified that she was worried that someone might trip on it. Edwards’s testimony that she did not notice that the drain cover was

² While Karen did not see plaintiff fall, Sydney witnessed his fall, but did not see his foot touch the drain cover. Sydney merely assumed that plaintiff had tripped over the drain cover, which caused him to fall.

elevated, without more, was insufficient to create a question of fact regarding whether it was objectively open and obvious.

Finally, plaintiff argues that the trial court's ruling is at odds with Michigan's comparative negligence scheme, embodied in MCL 600.2958 and MCL 600.6304. To the contrary, in *Lugo*, 464 Mich at 524, our Supreme Court made clear that "any comparative negligence by an invitee is irrelevant to whether a premises possessor has breached its duty to that invitee in connection with an open and obvious danger because an invitee's comparative negligence can only serve to reduce, not eliminate, the extent of liability." In other words, comparative negligence will come into play only after a determination that a defendant was liable, which in turn requires a finding that the defendant owed a duty to invitees. Because "the open and obvious doctrine should not be viewed as some type of 'exception' to the duty generally owed invitees, but rather as an integral part of the definition of that duty," when a court finds that a hazard was open and obvious, comparative negligence will not be part of the analysis in the first instance, because the plaintiff will have failed to establish a prima facie case. *Id.* at 516. Thus, the trial court's ruling is not at odds with Michigan's comparative negligence scheme, as plaintiff contends.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ E. Thomas Fitzgerald

/s/ Pat M. Donofrio