

STATE OF MICHIGAN  
COURT OF APPEALS

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DELORES CROSS-DOUGLAS, Conservator of  
the Estate of LEE ROY DOUGLAS,

UNPUBLISHED  
April 10, 2001

Plaintiff-Appellant,

v

FORD MOTOR COMPANY,

No. 215331  
Wayne Circuit Court  
LC No. 96-647429-NO

Defendant-Appellee.

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Before: Markey, P.J., and Murphy and Collins, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff's husband, Lee Roy Douglas, was injured on August 16, 1996, when he was working as a parts driver for a car dealership and fell off a loading dock at one of defendant's parts depots while in the process of loading a car hood into a van. Douglas has no memory of the accident. Plaintiff's complaint alleged negligence on theories including failure to warn, failure to make safe, and failure to train employees in the proper methods of maintaining the premises. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10) on the ground that this was a straightforward premises liability case and the open and obvious doctrine applied to all claims. The circuit court granted defendant's motion for summary disposition on that basis.

Plaintiff first argues that the circuit court erred in granting defendant summary disposition because the dangers posed by defendant's loading docks were not open and obvious, and even if they were, there was a genuine issue of material fact regarding whether the risk of harm was unreasonable. We disagree.

This Court reviews a trial court's grant or denial of a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual basis underlying the plaintiff's claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). We review the pleadings, affidavits, depositions, and any other documentary evidence in a light most favorable to the nonmoving party. *Id.* "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id.*

Defendant does not dispute that Douglas was its invitee. Premises owners have a duty to protect invitees from possible injury by exercising due care and maintaining their property in a reasonably safe condition. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 90; 485 NW2d 676 (1992). However, no duty is owed where the dangers are known or are open and obvious unless the risk of injury remains unreasonable in spite of knowledge and obviousness. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995). An invitor is subject to liability for physical harm caused to his invitees by a condition on the land if the invitor

(a) knows of, or by the exercise of reasonable care would discover, the condition and should realize that the condition involves an unreasonable risk of harm to such invitees; (b) should expect that invitees will not discover or realize the danger, or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect invitees against the danger. [*Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000).]

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. *Weakley v City of Dearborn Heights*, 240 Mich App 382, 385; 612 NW2d 428 (2000).

There is no question that the loading dock in this case presents the obvious danger of a drop-off between the loading area where the parts are stored and the bay area where vehicles park to be loaded. Plaintiff contends, however, that defendant's loading dock presents a further danger that is not open and obvious. Plaintiff points to deposition testimony by its expert concerning the steel dock plate at the end of the loading dock. Plaintiff's expert testified that the dock plates with which he is familiar are designed to rest on the back of a semi-trailer that is backed into the bay and up to the loading dock.<sup>1</sup> He explained that if the dock plate does not rest on the back of a trailer, it may drop when items are loaded onto it. Douglas picked up parts at defendant's depot in a panel van, the back edge of which is approximately two feet lower than the back edge of a semi-trailer. Thus, the dock plate would not be able to rest on the back of the van. Plaintiff describes this circumstance as a "hidden danger" that Douglas could not have anticipated, and even if it were known by Douglas, the open and obvious doctrine does not apply because the dock presented an unreasonable risk of harm.

First, the record is not clear with regard to whether the dock plate was extended beyond the end of the dock when Douglas was loading, or whether it was sitting on the dock itself. Zelek testified that when a truck that is lower than a semi-trailer backs into a bay, the dock plate is not used. This testimony indicates that the dock plate may not have been extended, but may have been sitting on top of the dock.

In any event, plaintiff's expert witness testimony that an unsupported dock plate "could conceivably fall" is not sufficient to create a genuine issue of fact with regard to whether the danger posed by defendant's dock was open and obvious, or whether the risk of harm was

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<sup>1</sup> Marion Zelek, one of defendant's employees at the depot, described the dock plate as a ramp that extends from the dock to the back of a trailer.

unreasonable. Douglas testified that he had loaded parts from loading docks at defendant's depot into the panel van several times a week during the three years he worked for the car dealership. He explained that he had developed a routine for loading large items into the van whereby he would "drag [the part] over to the dock, lay it down at the front edge of the dock, go down the steps and bring it off the dock and turn it around and put it on the truck." On the day of his accident, Douglas had already successfully loaded one car hood into the van in his usual fashion. Thus, the position of the dock plate and its behavior when the car hood was placed on it would have been clearly visible. Accordingly, we find no error in the court's determination that there exists no genuine issue of material fact with regard to whether any danger presented by defendant's dock was open and obvious.

Whether a danger presents an unreasonable risk of harm, notwithstanding its open and obvious nature, is determined by considering the "character, location, [and] surrounding conditions" of the danger. *Bertrand, supra* at 616-617, quoting *Garrett V Butterfield Theaters*, 261 Mich 262, 263-264; 246 NW2d 57 (1933); *Spagnuolo v Rudds #2, Inc*, 221 Mich App 358, 360-361; 561 NW2d 500 (1997). In order for the risk of injury to be an unreasonable one, a plaintiff must show that there is something unusual about the dangerous premises. *Bertrand, supra* at 617; *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 499; 595 NW2d 152 (1999).

Plaintiff presented no evidence that there was anything unusual about defendant's dock plates. Indeed, plaintiff's expert's testimony suggested that their tendency to drop when not supported is a common characteristic of such plates. There also was no evidence that the circumstances surrounding the dock at defendant's depot were any different on the day that Douglas fell than on any other day, and Douglas acknowledged that he had already successfully loaded one hood into the van in his usual fashion. He testified that he knew where the end of the dock was and that he had never fallen off or even almost fallen off before. In light of Douglas' familiarity with the loading docks and his testimony that he knew where the end of the dock was, any hazard presented by stepping on the dock plate, if it was extended, could have been avoided. See *Abke v Vandenberg*, 239 Mich App 359, 363; 608 NW2d 73 (2000); *Hottmann v Hottmann*, 226 Mich App 171, 176; 572 NW2d 259 (1997).

Plaintiff also contends that the conditions at defendant's depot were unreasonably dangerous because the people who were picking up parts were allowed to walk around in the area near the docks where "hi-lo's" were traveling, and defendant's employees rarely assisted in loading heavy items. However, Douglas was not injured as he walked to retrieve the car hoods from the inventory area, and he testified that he needed no help loading the car hoods.

We conclude that the evidence offered by plaintiff failed to create a question of fact with regard to whether conditions at defendant's depot presented an unreasonable risk of harm. There is simply not enough evidence to show that the danger posed by defendant's dock was unreasonable or that defendant should have expected that Douglas would fail to protect himself against the danger. *Stitt, supra*. Accordingly, the circuit court did not err in granting defendant summary disposition.

Plaintiff next argues that the circuit court erred by relying on the open and obvious doctrine because she alleged claims of general negligence and design defect that go beyond premises liability. Again, we disagree.

The open and obvious doctrine applies to “harms ‘caused by a dangerous condition of the land’ or ‘any activity or condition on the land.’” *Millikin, supra* at 496, quoting *Bertrand, supra* at 609-610. In *Millikin* the plaintiff tripped and fell over a supporting wire that extended from near the ground behind her mobile home to a utility pole. *Millikin, supra* at 491. After the trial court granted summary disposition for the defendant, the plaintiff appealed and claimed that the open and obvious doctrine should not apply because her case was not simply a failure to warn; rather, it was a claim of failure to maintain in a reasonable condition. The *Millikin* Court did not allow artful pleading to avoid the open and obvious doctrine’s application to activities or conditions on the land.

We further note that if we were to adopt plaintiff’s argument in this case, the open and obvious doctrine could be avoided in most, if not all, cases in which it would otherwise apply, simply through the expedient of artful pleading. [*Id.* at 497 n 4.]

In this case, plaintiff’s claims of negligence and design defect are based on allegations relating to the dangerousness of the dock, which is a condition on the land. Because the issue at hand relates to a condition on the land, the open and obvious doctrine applies.

Affirmed.

/s/ Jane E. Markey  
/s/ William B. Murphy  
/s/ Jeffrey G. Collins