

STATE OF MICHIGAN
COURT OF APPEALS

TODD CLEMENTS,

Plaintiff-Appellant,

v

SIGNATURE FLIGHT SUPPORT,

Defendant-Appellee.

UNPUBLISHED

March 15, 2005

No. 249572

Wayne Circuit Court

LC No. 02-203099-NI

Before: Kelly, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

I. Basic Facts

Plaintiff is an airplane mechanic. On December 19, 1997, he was employed by Champion Air to inspect an airplane at Detroit Metropolitan Airport. He arrived to conduct the inspection at approximately 6:35 a.m. On that same day, defendant was supposed to provide ground handling services for Champion Air for the same airplane, which was scheduled to depart at 9:00 a.m. According to normal procedure, defendant's employees would arrive approximately an hour and a half before the departure time. Plaintiff alleged that as he was looking up inspecting the airplane he tripped over a chock placed by defendant. There were no witnesses to the fall. Plaintiff alleged that defendant breached its duties of care by placing a wheel chock "in the path of persons working around the airplane, and not under the wheel of the airplane." Plaintiff also alleged that defendant failed to keep the path safe from hazards or failed to warn of the hazards.

Defendant moved for summary disposition arguing that the wheel chock was open and obvious and that there was no genuine issue of fact as to whether defendant had placed that chock. Defendant presented evidence that the chocks it used at that time at that location were different from the chock described by plaintiff. Plaintiff described the chock he tripped on as black, triangular, three to four feet long, four to five inches high, and made of heavy rubber. Defendant presented testimony that the chocks it used at that location at the time of plaintiff's injury were yellow rectangular wood, sixteen to eighteen inches long, six inches high and wide. Further, although it is undisputed that defendant provided ground handling for the airplane that

plaintiff was inspecting, defendant presented evidence that more than one ground handling crew operated in that area at the time of the incident.

In response, plaintiff first argued that the open and obvious doctrine did not apply to this case because it did not involve premises liability. Plaintiff also argued that summary disposition should be granted in his favor because there was no genuine issue of fact as to whether defendant failed to follow its own safety procedures. Plaintiff relied on defendant's written safety procedures, which only permitted its employees or those who are "under the direct control" of defendant to have access to the ramp area where the airplane was parked. The safety procedures further required defendant to observe these persons at all times and required defendant's employees to patrol for foreign objects "and its sources at all times." Plaintiff further cited deposition testimony of defendant's safety director Robert Lazuka and manager of airlines services Carl Comstock who testified that a chock under an airplane that was not securing an airplane's wheels was a safety hazard. Plaintiff argued that this evidence demonstrated that defendant had a duty to protect plaintiff from harm on the ramp area and that defendant breached its duty to keep the ramp area clear of hazards regardless of who placed the chock.

At the motion hearing, defense counsel asserted that if plaintiff's theory depended on defendant having possession and control of the ramp, then it was a premises liability theory and the open and obvious rule applied.

The trial court determined that defendant generally performs its services relative to a certain airplane and then leaves, but it does not have control over the ramp area. The trial court also determined that the evidence failed to demonstrate that defendant placed the chock that defendant tripped on or had control over that chock. The trial court further ruled:

This is, yes, an open and obvious issue, but what is really at the bottom of this is no reasonable juror could find that the natural and probable result of leaving this obvious piece of matter there is going to be that an engineer in the middle of the night is going to fall over it and injury himself, not having bothered to look at the ground. They are not negligent as a matter of law.

II. Standard of Review and Generally Applicable Law

We review de novo a trial court's ruling on a motion for summary disposition. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id.*

"This Court is liberal in finding a genuine issue of material fact." *Marlo Beauty Supply, Inc v Farmers Ins Group*, 227 Mich App 309, 320; 575 NW2d 324 (1998). "The question whether a defendant has breached a duty of care is ordinarily a question of fact for the jury and not appropriate for summary disposition." *Latham v National Car Rental Systems, Inc*, 239 Mich App 330, 340; 608 NW2d 66 (2000). But if the "moving party can show either that an essential element of the nonmoving party's case is missing, or that the nonmoving party's

evidence is insufficient to establish an element of its claim, summary disposition is properly granted.” *Id.*

To establish a prima facie case of negligence, a plaintiff must prove: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Latham v National Car Rental Systems, Inc.*, 239 Mich App 330, 340; 608 NW2d 66 (2000).

III. Analysis

A. Plaintiff’s Complaint

On appeal, plaintiff argues that he did not allege a claim of premises liability. Defendant argues that plaintiff did. The trial court appears to have determined that, at least in part, plaintiff pleaded a premises liability claim.

After reviewing the complaint, we conclude that plaintiff pleaded two theories: ordinary negligence and premises liability. The allegation that plaintiff breached a duty of care by placing the chock under the plane sounds in ordinary negligence because it does not necessarily bear any reference to defendant’s relationship to the premises. However, the allegations that defendant failed to keep the “path” free of hazards or failed to warn of the hazards on the “path” presupposes that defendant had possession and control over the “path.” Possession and control are the bases of a premises liability claim. *Kubczak v Chemical Bank & Trust Co.*, 456 Mich 653, 660; 575 NW2d 745 (1998).

B. Ordinary Negligence

With regard to plaintiff’s ordinary negligence claim, after thoroughly reviewing the record, we conclude that plaintiff failed to present enough evidence to create a genuine issue of fact regarding whether defendant placed the chock at issue. Defendant presented deposition testimony that the type of chocks it used at that Detroit Metropolitan Airport location at that time were different than the chock plaintiff described having tripped on. Plaintiff described the chock he tripped on as black, triangular, three to four feet long, four to five inches high, and made of heavy rubber. Defendant presented testimony that the chocks it used at that location at the time of plaintiff’s injury were yellow rectangular wood, sixteen to eighteen inches long, six inches high and wide. Defendant also presented deposition testimony that several other ground support services operated in that area at the time of the incident. The only evidence plaintiff presented in support of his allegation that defendant placed the chock he described was testimony that defendant used rubber chocks at that location “for like belt loaders but they are chained to the belt loader.” However, the chock that plaintiff described tripping on was not chained to a belt loader. Without any other evidence linking defendant to this chock, this testimony is insufficient to create a genuine issue of material fact as to whether defendant placed the chock as plaintiff alleged.

C. Premises Liability

We next address plaintiff’s premises liability claim. Regardless of whether plaintiff was a licensee or an invitee, any duty defendant would have had did not extend to the removal of open and obvious dangers. *Lugo v Ameritech Corp.*, 464 Mich 512, 516; 629 NW2d 384 (2001);

Pippin v Atallah, 245 Mich App 136, 143; 626 NW2d 911 (2001). A condition is open and obvious if it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection. *Lugo, supra* at 516. In this case, plaintiff described the chock he tripped on as black, triangular, three to four feet long, four to five inches high, and made of heavy rubber. We conclude that a reasonable person of ordinary intelligence would have discovered this rather large object upon casual inspection. Indeed, plaintiff himself testified, “If I was looking down and expecting that there was a potential problem, yeah, I would have probably seen them.” Additionally, on appeal, plaintiff’s counsel indicated that plaintiff did see the chock when he initially arrived at the site, but forgot about it as he was performing his inspection.

We reject plaintiff’s suggestion that defendant should have anticipated the danger despite the open and obvious nature of the chock because plaintiff’s attention was focused upward and because it was dark when he tripped. Although open and obvious, a danger may impose liability on a premises possessor if it has “special aspects” that “‘give rise to a uniquely high likelihood of harm or severity of harm’” *O’Donnell, supra* at 576-578. *O’Donnell v Garasic*, 259 Mich App 569, 573; 676 NW2d 213 (2003). Neither one of the circumstances plaintiff cites was a special aspect that gave rise to a uniquely high likelihood of harm. Although plaintiff could not inspect the airplane and inspect the ground at the same time, plaintiff could have inspected the ground beneath the airplane *before* conducting his inspection of the airplane and remembered where the chock was placed. Furthermore, the evidence indicates that there was artificial lighting in the area adequate to allow airplanes to be fueled and to allow “people loading and off-loading these airplanes” to read tags “two inches by one inch wide.” Thus, while a flashlight was required to inspect the airplane, the artificial lighting was sufficient to allow a person to see a chock. Further, as noted above, plaintiff initially did see the chock and testified that, had he looked down during the inspection, he would have seen it again. Therefore, we conclude that the trial court did not err in dismissing plaintiff’s premises liability claim because the danger presented by the chock was open and obvious.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Henry William Saad
/s/ Michael R. Smolenski