

STATE OF MICHIGAN
COURT OF APPEALS

EDWARD T. SIMCOX,

Plaintiff-Appellant,

v

ABC APPLIANCE, INC., d/b/a ABC
WAREHOUSE,

Defendant-Appellee.

UNPUBLISHED

July 5, 2005

No. 261679

Wayne Circuit Court

LC No. 04-406754-NO

Before: O’Connell, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order granting defendant’s motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

Plaintiff fell as a result of a pothole in front of defendant’s store. Plaintiff came to defendant’s store on several occasions before the incident. On the day he incurred his injury, plaintiff had left defendant’s store, then decided to return. In the meantime, a truck had pulled in front of the store entryway. Thus, plaintiff chose a path to avoid the people who were loading the truck. While plaintiff was walking to the entrance, an ABC employee yelled to him. As plaintiff turned to answer, he was suddenly on the ground. Plaintiff claims he did not see the pothole until after he fell. An employee estimated that the hole was approximately eight inches in diameter and 1 ½ or 2 inches deep.

II. STANDARD OF REVIEW

We review a trial court’s decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich. 557; 664 N.W.2d 151 (2003). A motion brought pursuant to MCR 2.116(C)(10) should be granted when the evidence demonstrates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich. App. 244, 246; 631 N.W.2d 760 (2001). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ. *West v GMC*, 469 Mich. 177, 183; 665 N.W.2d 468 (2003).

III. ANALYSIS

A. OPEN AND OBVIOUS

A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it for himself. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609-610; 537 NW2d 185 (1995).

The open and obvious danger doctrine attacks the duty element that a plaintiff must establish in a prima facie negligence case. *Id.* at 612. Whether the pothole is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon causal inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 449 NW2d 379 (1993).

We agree with the trial court that there is no genuine issue of material fact that the pothole was an open and obvious danger. Plaintiff has not presented evidence that would indicate the pothole was not discoverable. According to plaintiff, there was nothing that would have prevented him from seeing the pothole had he not been distracted while walking. The pothole was not covered by a tarp or hidden in any fashion that would have kept the average person from discovering its existence.

Plaintiff argues that at the time of the fall, he was distracted by a question posed by an employee. In *Lugo*, the plaintiff also claimed that she was distracted, testifying that she was not watching the ground because she was concentrating on a truck in the parking lot. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 514-515; 629 NW2d 384 (2001). The Court noted her argument that moving vehicles in the parking lot were a distraction, but explained, “[T]here is certainly nothing ‘unusual’ about vehicles being driven in a parking lot, and accordingly, this is not a factor that removes this case from the open and obvious danger doctrine.” *Id.*, p 522. Similarly, conversation in a parking lot is not so unusual that it should remove the case from the open and obvious doctrine.

B. SPECIAL ASPECTS

If special aspects of a condition make even an open and obvious risk unreasonably dangerous, the landowner has a duty to undertake reasonable precautions to protect his invitees. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001). But “only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine.” *Id.*, p 519. The *Lugo* Court provided two examples to illustrate when a condition could be considered unavoidable or unreasonably dangerous: (1) when the floor of a commercial building with a single exit is covered with water, the open and obvious doctrine would not apply because the condition would be essentially unavoidable; (2) when an unguarded thirty-foot hole exists in the middle of a parking lot, the open and obvious doctrine would not bar liability because the situation “would present such a substantial risk of death or severe injury to one who fell in the pit

that it would be unreasonably dangerous to maintain the condition, at least absent reasonable warnings or other remedial measures being taken.” *Id.*, pp 518-519.

Plaintiff argues that because the only public entrance to the store was blocked by a parked vehicle, he was forced to traverse a hazardous area, thus, contact with the pothole was essentially unavoidable. We disagree. Despite the obstruction posed by the vehicle, plaintiff was not forced to walk through the pothole to reach the store entrance. A customer could simply walk around the pothole which was approximately eight inches wide or the size of a man’s size-10½ shoe.

Finally, plaintiff argues that it was not open and obvious that one’s foot could get caught inside the pothole and that this was a unique aspect of the pothole. The fact that the pothole happened to be configured so that it was possible for a shoe to become caught in it does not alter the analysis. “[P]otholes are an ‘everyday occurrence’ that ordinarily should be observed by a reasonably prudent person.” *Id.*, p 523. There are no special aspects that made this pothole uniquely high in the likelihood or severity of harm.

Affirmed.

/s/ Peter D. O’Connell

/s/ Bill Schuette

/s/ Stephen L. Borrello