

STATE OF MICHIGAN  
COURT OF APPEALS

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FRANK SALO,

Plaintiff-Appellant,

v

KROGER COMPANY and KROGER  
COMPANY OF MICHIGAN,

Defendants-Appellees.

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UNPUBLISHED

April 1, 2014

No. 314514

Ingham Circuit Court

LC No. 12-000025-NO

Before: RONAYNE KRAUSE, P.J., and FITZGERALD and WHITBECK, JJ.

WHITBECK, J. (*concurring in part and dissenting in part*).

I agree with the majority’s conclusion that Salo’s claim sounds in premises liability. However, I dissent from the majority’s conclusion that a question of fact exists concerning whether the grease was open and obvious.

The premises possessor does not have a duty to rectify conditions that are “so obvious that the invitee might reasonably be expected to discover them . . . .”<sup>1</sup> A danger is open and obvious if “an average user of ordinary intelligence acting under the same conditions would have been able to discover the danger and the risk presented by the condition upon casual inspection.”<sup>2</sup>

Salo testified that he was heading toward the store’s deli section to look for his wife when he fell, and that he “didn’t bother looking at the floor[.]” Salo also testified as follows:

Q. When you were helped off the floor, did you—was the grease still there?

A. Yes; it was.

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<sup>1</sup> *Riddle v McLouth Steel Prod Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992).

<sup>2</sup> *Grandberry-Lovette v Garascia*, \_\_\_ Mich App \_\_\_, \_\_\_; \_\_\_ NW2d \_\_\_ (2014) (slip op at 12) (quotation marks and citation omitted).

Q. Could you see it when you stood up?

A. Yes.

Salo later signed an affidavit stating that he could “barely see the grease” when he stood up. However, a party may not create an issue of fact by contradicting his unequivocal deposition testimony with contradictory statements in an affidavit.<sup>3</sup> At deposition, Salo unequivocally testified that he could see the grease while standing. Therefore, I would not consider Salo’s subsequent, self-serving statement in his affidavit that he could “barely” see the grease.

Here, Salo unequivocally testified at deposition that he could see the grease on the floor while he was standing. Thus, a reasonable person on a casual inspection would have been able to discover the grease, and Salo could have avoided the danger. I would conclude that Salo’s own statements at deposition show that there is no question of material fact concerning whether the danger was open and obvious.

I would affirm.

/s/ William C. Whitbeck

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<sup>3</sup> *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480-481; 633 NW2d 440 (2001).