

STATE OF MICHIGAN
COURT OF APPEALS

DAVID CUMMINGS, as personal representative
of THE ESTATE OF DANIEL CUMMINGS,

UNPUBLISHED
June 19, 2012

Plaintiff-Appellant,

v

No. 301894
Wayne Circuit Court
LC No. 10-001244-NO

STEVEN OLSEN and MARILEE OLSEN,

Defendant-Appellees,

and

THE ENGINEERING DIVISION OF THE
PUBLIC WORKS DEPARTMENT and CITY OF
LIVONIA,

Defendants.

Before: WHITBECK, P.J., and JANSEN and K. F. KELLY, JJ.

PER CURIAM.

In this premises liability action, plaintiff David Cummings, as personal representative of the estate of Daniel Cummings (Cummings), appeals as of right the trial court's order granting defendants Steven and Marilee Olsen's motion for summary disposition pursuant to MCR 2.116(C)(10). On appeal, David Cummings asserts that the trial court erred by finding that the Olsens owed no duty to Cummings and that the area where Cummings was injured was not open and obvious. We disagree and affirm the trial court's decision.

I. FACTS

On August 8, 2009, at approximately 11:00 p.m., Cummings left his friend's house to go home after a birthday party. Cummings was riding his bicycle on the sidewalk on the west side of Chicago Street in Livonia. While riding his bicycle, Cummings did not notice that the sidewalk jutted out to the right to curve around a boulder that was located in the grass outside the Olsens' home. Instead of following the curve in the sidewalk, Cummings continued straight, hit the boulder, and was thrown off his bicycle. Cummings landed on the grass and struck his head on the ground. Cummings claimed that the sidewalk was poorly lit and that he did not see the boulder or have time to react to the curve in the sidewalk.

Cummings stated that he was unconscious for a period of time before being able to call for help. Cummings was then taken to the hospital where he was diagnosed with having a

broken neck and two blood clots. Cummings underwent surgery and continued medical care for his neck up until his death in May 2010. Cummings passed away from events unrelated to this litigation.

David Cummings then brought action against the City of Livonia, The Engineering Division of the Department of Public Works, and the Olsens. David Cummings alleged that the City of Livonia, the Engineering Division of the Department of Public Works, and the Olsens failed to design the sidewalk in a reasonable and safe manner, failed to avoid putting a large boulder in an unreasonable location, and failed to avoid placing the boulder in a condition that was unreasonable for the safety of the public.

The City of Livonia and the City of Livonia Engineering Division of the Department of Public Works moved for summary disposition and for sanctions pursuant to MCR 2.116(C)(7) and (C)(8), arguing that they were entitled to governmental immunity. The trial court granted the motion. Therefore, the City of Livonia and the City of Livonia Engineering Division of the Department of Public Works are not parties to this appeal.

The Olsens also moved for summary disposition, claiming that they had no duty to maintain a public sidewalk, they were not responsible for designing and/or constructing the sidewalk, nor were they responsible for the lighting of the street or the sidewalk. The Olsens also contended that they owed no duty to Cummings because the condition of the sidewalk was open and obvious.

David Cummings responded, arguing that the Olsens had a common law duty to protect pedestrians from an unreasonably dangerous condition on their property that is in an area that is frequently walked. David Cummings argued that the Olsens also had a duty to remove the boulder or warn against it. According to David Cummings, this boulder was not open and obvious because (1) the condition was not open and obvious under the current Michigan law, and (2) it was an unreasonably dangerous condition that would fall into the exception to an open and obvious defense.

The trial court granted the defense motion for summary disposition. In so holding, the trial court reasoned that “the only reason that it’s not open and obvious is because of those facts [‘the plaintiff put himself in a position, in the dark, while drinking, while driving a bike on a sidewalk without lights’]. Therefore, should you go to jury on that? My answer is no.”

David Cummings, as personal representative of the Estate of Daniel Cummings, now appeals.

II. MOTION FOR SUMMARY DISPOSITION

A. STANDARD OF REVIEW

This Court reviews de novo a trial court’s grant of summary disposition.¹ This Court’s review is limited to the evidence that was presented to the trial court at the time the motion was

¹ *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

decided.² A court properly grants a motion pursuant to MCR 2.116(C)(10) when the proffered evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.³ A genuine issue of material fact is found to exist “when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party.”⁴

B. APPLICABLE LEGAL PRINCIPLES

It is well established that landowners have a duty to warn licensees of hidden dangers that are reasonably known to the landowner and reasonably unknown to the licensee.⁵ This duty does not extend to open and obvious dangers, however, unless the danger possesses special aspects that make it unreasonably dangerous to maintain.⁶ Whether a danger 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 casual inspection.⁷ This objective test asks “whether a reasonable person in the plaintiff’s position would have foreseen the danger, not whether the particular plaintiff knew or should have known that the condition was hazardous.”⁸ When deciding a summary disposition motion based on the open and obvious danger doctrine, “it is important for courts . . . to focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff.”⁹ However, “if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect [against the] risk.”¹⁰ Thus, in this case, the issue is whether the boulder on which Cummings was injured was an open and obvious condition and, if so, whether the condition of the sidewalk was unreasonably dangerous despite being open and obvious.

C. ANALYSIS

1. OPEN AND OBVIOUS

Questions of fact regarding the lighting of an area can be a ground on which to deny summary disposition. In *Abke v Vandenberg*, a customer purchasing hay was injured when he

² *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

³ *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007).

⁴ *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

⁵ *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596, 614 NW2d 88 (2000).

⁶ *Lugo v Ameritech Corp Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001).

⁷ *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993).

⁸ *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 479; 760 NW2d 287 (2008).

⁹ *Lugo*, 464 Mich at 523-24.

¹⁰ *Id.* at 517.

fell off a loading dock into a truck bay.¹¹ The area where the customer was injured was poorly illuminated.¹² The defendant moved for a directed verdict and for judgment notwithstanding the verdict on the grounds that the area where the customer fell was open and obvious and did not pose an unreasonable risk of harm.¹³ The trial court denied the defendant's motions.¹⁴ This Court affirmed, holding that there was a factual discrepancy concerning the visibility of the area where the customer was injured.¹⁵

In contrast, the record here is absent of any evidence to suggest that the average person could not have discovered the danger because of poor lighting. David Cummings argues that the area where Cummings was injured was poorly illuminated because the closest light was located several homes down the street from the location of the accident. However, Steven Olsen testified in his deposition that, on the evening of the accident, the light across the street from the Olsens' home illuminated the location of Cummings' accident. And, despite his arguments, David Cummings has failed to actually produce contrary evidence beyond mere speculation and conjecture, which are insufficient to create a genuine issue of fact for a jury.¹⁶ Thus, our review of the record leads us to conclude that there is no genuine issue of material fact regarding the open and obvious nature of the boulder.

2. SPECIAL ASPECTS

Even assuming that the boulder was open and obvious, it is critical that this Court consider whether special aspects regarding the condition of the sidewalk created an unreasonable risk of harm and, thus, removed it from the open and obvious defense.¹⁷ In *Lugo v Ameritech Corp Inc*, the Court held that, to be sufficient to remove a condition from the open and obvious defense, "special aspects" of the condition must "give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided."¹⁸ The Court explained that "an unguarded, 30 foot deep pit in the middle of a parking lot" was unreasonably dangerous because it presented a

¹¹ *Abke v Vandenberg*, 239 Mich App 359, 360; 608 NW2d 73 (2000).

¹² *Id.* at 362.

¹³ *Id.* at 360-361.

¹⁴ *Id.* at 361.

¹⁵ *Id.* at 362.

¹⁶ *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 192-193; 540 NW2d 297 (1995) ("A party opposing a motion for summary disposition must present more than conjecture and speculation to meet its burden of providing evidentiary proof establishing a genuine issue of material fact."); *SSC Assoc Ltd Partnership v Detroit Gen Retirement Sys*, 192 Mich App 360, 364; 480 NW2d 275 (1991) ("Opinions . . . do not satisfy the court rule; disputed fact (or the lack of it) must be established by admissible evidence.").

¹⁷ *Lugo*, 464 Mich at 517-518.

¹⁸ *Id.* at 518-519 (stating that an unguarded 30-foot deep pothole in the middle of a parking lot presented a uniquely high probability of death or severe injury).

“substantial risk of death or severe injury to one who fell in the pit.”¹⁹ In contrast, an ordinary pothole or unmarked cement step lacked the requisite “unusual” risk of harm.²⁰ Additionally, this Court must evaluate the condition “before the incident involved in a particular case.”²¹ “It would, for example, be inappropriate to conclude in a retrospective fashion that merely because a particular plaintiff, in fact, suffered harm or even severe harm, that the condition at issue in a case posed a uniquely high risk of severe harm.”²² Furthermore, a condition is not removed from the open and obvious defense merely because the plaintiff could not see it.²³

In light of the foregoing, this Court cannot conclude that the sidewalk in the present case possessed special aspects necessary to remove it from the open and obvious defense. The record is absent evidence to establish that an unusual condition of the sidewalk presented a substantial risk of death or severe injury in spite of Cummings’ injuries.²⁴ Additionally, David Cummings cannot avoid summary disposition merely because Cummings failed to notice the curve of the sidewalk.²⁵ Therefore, we hold that there is no genuine issue of material fact that the Olsens had no duty to protect Cummings from the open and obvious condition of the sidewalk.

We affirm.

/s/ William C. Whitbeck

/s/ Kathleen Jansen

/s/ Kirsten Frank Kelly

¹⁹ *Id.* at 518.

²⁰ *Id.* at 521-522.

²¹ *Id.* at 519, n 2.

²² *Id.*

²³ *Id.* at 521-522.

²⁴ *Id.* at 519, n 2 (“[A] plaintiff may suffer a more or less severe injury because of idiosyncratic reasons, such as having a particular susceptibility to injury or engaging in unforeseeable conduct, that are immaterial to whether an open and obvious danger is nevertheless unreasonably dangerous.”).

²⁵ *Id.* at 522.