STATE OF MICHIGAN

COURT OF APPEALS

ANDREW JACKSON DUNKLE and FRAN DUNKLE,	UNPUBLISHED August 26, 2003
Plaintiffs-Appellees,	
v	No. 218789 Genesee Circuit Court
KMART CORPORATION,	LC No. 96-051557-NO
Defendant-Appellant.	ON REMAND

Before: Whitbeck, C.J., and Murphy and Cooper, JJ.

PER CURIAM.

This trip and fall case comes back to us on remand from the Supreme Court. Defendant Kmart's sole issue in its original appeal to this Court was whether the trial court erred in declining to rule that, as a matter of law, it was shielded from liability because the hazard over which plaintiff Andrew Dunkle tripped, a pallet on which boxes were stacked, was an open and obvious condition. In our previous opinion, we concluded that the trial court properly denied Kmart's motions and we affirmed.[1] Kmart filed an application for leave to appeal to the Supreme Court. In lieu of granting that application, the Supreme Court remanded, stating:

> [T]he decision of the Court of Appeals is vacated, and the case is remanded to the Court of Appeals for reconsideration in light of the objective standard set forth in *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516-517 (2001).[2]

I. Basic Facts And Procedural History

In *Dunkle 1*, we set out the basic facts and procedural history of this case at the trial level and we repeat them here.

A. The Accident

According to Dunkle's testimony at trial, on September 5, 1996, he went to Kmart's retail store in Grand Blanc to get some peanuts for his wife. Dunkle testified that he entered the store

[1] Unpublished per curiam opinion of the Court of Appeals, issued November 20, 2002 (Docket No. 218789) (*Dunkle 1*).

[2] *Dunkle v Kmart Corporation*, 468 Mich 883; 661 NW2d 232 (2003).

from the north, approached the aisle with the peanuts through the "east/west main aisle," then turned and "observed at the entranceway toward where the peanuts were . . . a lot of boxes sat there . . . ." Dunkle explained further:

> And there was no attendant and there was no caution or anything to cause me not to think that that—those boxes there were lined up—the shelving of the peanuts, that the main—that the aisle that I was going to be using to pick up the peanuts, I had no reason to think it wasn't clear.

Dunkle stated that he did not notice "in particular" that the boxes were stacked on a pallet. Dunkle added that he walked "from west to east and . . . expected to make a turn where the top of the boxes ended, stating:

> [W]hen I walked to the left to avoid the boxes I might have been a foot or two feet more from them and I made a turn because the boxes that were on the pallet . . . seemed to be in direct alignment with the metal shelving that held the peanuts.
>
> * * *
>
> So I made a turn, . . . and I was looking for the peanuts, I am not looking down, and by the time I make the turn—or tried to make the turn my right foot got hooked underneath . . . , and then I think my left foot also struck it because I was trapped. I couldn't get out.

Dunkle explained that he then fell, and felt great pain in his elbow, shoulder, and neck. Asked what was the last thing he saw before making that right turn, Dunkle replied as follows:

> Probably the top of the boxes, which seemed to be in alignment with the shelving at the aisle of the peanuts. So, that being the case, I started to make the turn where the boxes—where the end of the loaded pallet—the most eastwardly box is the one where I started to make the turn. Then I realized when I got my foot hooked that that pallet had been unloaded—or maybe it never was loaded—but that portion of it, I would say eighteen to twenty inches, I am guessing with that proximity, projected into the aisle that I was gonna walk down, and I wasn't lookin' down at the floor because I knew where I was going.

B. The Motion For Summary Disposition

Before trial, Kmart moved for summary disposition under MCR 2.116(C)(10) (no genuine issue as to material fact). Kmart relied on *Bertrand v Alan Ford, Inc*[3] and argued that the hazard posed by the pallet was open and obvious. Kmart then invoked the test set forth in *Novotney v Burger King (On Remand),*[4] to the effect that the question is "would an average user

[3] *Bertrand v Alan Ford, Inc*, 449 Mich 606; 537 NW2d 185 (1995).

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

with ordinary intelligence have been able to discover the danger and the risk presented upon casual inspection?" Kmart argued that there was nothing concealed or otherwise deceptive about the pallet and that Dunkle admitted in his deposition that if he had looked at the pallet he would have had no difficulty in discovering its presence. Dunkle responded with the argument that, essentially, the danger posed by the pallet was not open and obvious. The trial court agreed with Dunkle and denied the motion.

C. The Motion For Directed Verdict

At the close of Dunkle's proofs, Kmart moved for a directed verdict, again citing the open and obvious doctrine. In particular, Kmart argued that, under *Novotney,* it is necessary for a plaintiff to come forward with evidence to create a genuine issue of material fact as to whether an ordinary user upon casual inspection could have discovered the existence of the condition complained of. The trial court denied the motion, stating:

> I am not prepared to say that a finder of fact could find that the risk presented by this configuration was discoverable upon casual inspection. Given the manner in which the boxes were placed upon the pallet and their apparent alignment with the racks of merchandise, I think a casual observer moving through a commercial store would look at that and conclude that the extension from the racks consisted of the boxes which were visible to a height somewhere in the middle of Mr. Dunkle's chest and that it would be reasonable to conclude from that observation that it was an extension of those racks and that he could proceed around the corner, up the aisle to where he was headed. Therefore, I don't believe that the Defendant establishes the first element, and that is that under Novatney [sic] and the test set forth therein that this risk is open and obvious.

Kmart's counsel then raised the question of the extent of the trial court's ruling:

> MR. McCORMICK: The court is denying the motion; I understand that. The Court is not – or is it – making a finding of fact that the condition complained of was not in fact open and obvious, or is the Court simply indicating that that remains to be determined as a matter of fact?
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> THE COURT: That's a determination to be made; I am not making any determination at this time; I haven't heard all the evidence.

D. The Trial Court Decision

After hearing Kmart's proofs and the arguments of the parties, the trial court rendered its written opinion in mid-December of 1998 in Dunkle's favor, stating:

> [T]his Court finds that the configuration of the danger, as represented in the photographs, was not open and obvious, but, in fact, created a trap for the plaintiff. The alignment of the edge of the pallet with the cardboard boxes, created the appearance that the aisle extended to the north. However, the empty end of the pallet was low to the ground and extended two feet into the peanut

> aisle. An individual, such a plaintiff, turning that corner . . . would encounter the low end of the pallet extending into the aisle. The configuration exhibited in the photographs is not open and obvious. In my opinion, it is the exact opposite of open and obvious.

II. *Lugo*

Lugo was a premises liability action in which the plaintiff, Odis Lugo, fell after stepping in a pothole in a parking lot that defendant Ameritech owned. The trial court granted summary disposition in favor of Ameritech, but this Court reversed, rejecting Ameritech's position that Lugo's claim was barred by the "open and obvious" doctrine. The Supreme Court, in a divided opinion[5] with Justice Taylor writing for the majority, reversed the judgment of this Court and reinstated the judgment of the trial court, stating that "[t]he pothole was open and obvious, and [Lugo] has not provided evidence of special aspects of the condition to justify imposing liability on defendant despite the open and obvious nature of the danger."[6]

The reasoning of the Court's majority was straightforward. Citing *Bertrand*,[7] Justice Taylor first noted the general proposition that a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land.[8] Citing *Riddle v McLouth Steel*,[9] Justice Taylor then observed that this duty does not generally encompass removal of open and obvious dangers.[10] Moving to the heart of the matter, Justice Taylor stated that the open and obvious doctrine should not be viewed as some type of exception to the duty generally owed invitees, but "rather as an integral part of the definition of that duty."[11] Summing up the general rule, Justice Taylor then concluded:

> [A] premises possessor is not required to protect an invitee from open and obvious dangers, but 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 invitees from that risk.[12]

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[5] All of the Justices joined in the decision to reverse this Court and reinstated the judgment of the trial court. Justice Cavanagh, with Justice Kelly joining him, wrote a separate concurrence to express his disagreement with the majority's "special aspects" analysis. *Lugo*, *supra* at 527. Justice Weaver wrote a separate concurrence to express her disagreement with what she believed to be a new standard by which open and obvious defects will be deemed unreasonably dangerous despite their open and obvious presence. *Id.* at 544.

[6] *Lugo*, *supra* at 514.

[7] *Betrand*, *supra* at 609.

[8] *Lugo*, *supra* at 516.

[9] *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992).

[10] *Lugo*, *supra* at 516.

[11] *Id.*

[12] *Id.* at 517.

Justice Taylor then provided several illustrations of "special aspects" of open and obvious conditions that would differentiate the risk posed by such conditions from typical open and obvious risks so as to create an unreasonable risk of harm. His first illustration was that of a commercial building with a floor covered with standing water and with only one exit for the general public over which a customer wishing to exit the building must leave. Justice Taylor observed that under such circumstances, "the open and obvious condition is effectively unavoidable."[13] Justice Taylor's second illustration was that of an unguarded thirty-foot-deep pit in the middle of a parking lot. According to Justice Taylor, while such a condition might well be open and obvious and one would likely be capable of avoiding the danger, nevertheless "this situation would present such a substantial risk of death or severe injury to one who fell in the pit it would be unreasonably dangerous to maintain the condition, at least absent reasonable warnings or other remedial measures being taken."[14]

Applying the general principles that he had articulated, Justice Taylor concluded that there was no genuine issue of material fact with respect to whether Lugo's claim was barred by the open and obvious danger doctrine, stating:

> This case simply involved a common pothole in a parking lot. While [Lugo] argues that the pothole was filled with debris, the evidence presented to the trial court simply does not allow a reasonable inference that the pothole was obscured by debris at the time of [Lugo's] fall. Indeed, [Lugo's] testimony at her deposition was that she did not see the pothole because she "wasn't looking down," not because of any debris obscuring the pothole.[15]

But Justice Taylor was careful to note that, while the Supreme Court was reinstating the judgment of the trial court, it was also disapproving part of the trial court's apparent rationale. The trial court had stated that Lugo had been "walking around without paying proper attention to the circumstances where she was walking." Justice Taylor, rather pointedly, stated that it is the *condition of the premises*, not a plaintiff's possible negligence, which is central when resolving an issue regarding the open and obvious doctrine. [16] The question, then, is whether the condition of the premises was open and obvious and, if so, whether there were special aspects of the situation that nevertheless made it unreasonably dangerous. Justice Taylor stated:

> Accordingly, it is important for courts in deciding summary disposition motions by premises possessors in "open and obvious" cases 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.[17]

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[13] *Id.* at 518.

[14] *Id.*

[15] *Id.* at 521.

[16] *Id.* at 523.

[17] *Id.* at 523-524.

III. Applying the *Lugo* Objective Standard

A. Procedural Peculiarities

The procedural peculiarities of this case somewhat complicate the process of applying *Lugo's* objective standard. Here the trial court made three distinct rulings. At the summary disposition stage, this case is the mirror image of *Lugo*. There, the trial court granted summary disposition; here, the trial court denied summary disposition. There, the trial court accepted Ameritech's contention that, as a matter of law, there was no genuine issue of material fact that the risk posed by the pothole in its parking lot, into which Lugo stepped and fell, was open and obvious; here, the trial court rejected Kmart's contention that, as a matter of law, there was no genuine issue of material fact that the risk posed by the pallet, over which Dunkle tripped, was open and obvious. In both instances, however, the trial court was ruling on matters of law, not making findings of fact. Indeed, here the trial court stated in its oral ruling of June 16, 1997 on the motion for summary disposition:

> Looking at the photographs that have been presented to me and also having read the deposition of [Dunkle], provided to me, I still think that there is *an issue of fact* present as to whether or not the actual mechanism that caused Mr. Dunkle to fall *was open and obvious to him.*[18]

In *Lugo*, because the trial court granted summary disposition in favor of Ameritech, there was no motion for directed verdict. Here, there was such a motion, and the trial court concluded that it was not prepared to say that a finder of fact could find that the risk the pallet presented was "discoverable upon casual inspection." In other words, the trial court, while not yet acting as a finder of fact, appeared to recognize that, based upon Dunkle's proofs, there remained a factual question as to whether the risk the pallet posed was open and obvious.

In *Lugo*, there was no trial at all, whether to a jury or to the trial court sitting as a finder of fact. Here, there was a bench trial, and the trial court therefore shifted into its fact-finding mode. The trial court found the risk the pallet posed (the trial court's exact words were "the configuration of the danger"), represented by the photographs of the accident scene, was not open and obvious, "but, in fact, created a trap for [Dunkle]." The trial court went on to say that "[t]he configuration exhibited by the photographs is not open and obvious. In my opinion, it is the exact opposite of open and obvious."

Kmart's appeal here is not of the trial court's ultimate decision. Rather, Kmart's appeal is of the trial court's denial of its motions for summary disposition and for directed verdict. Kmart's supplemental brief on remand argues that the trial court erred in denying its motion for summary disposition and directed verdict, not that the trial court erred in its ultimate finding that the risk the pallet posed was not open and obvious. We review de novo decisions on motions for summary disposition and for directed verdict as questions of law.[19] We are constrained to note,

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[18] Emphasis supplied.

[19] *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999) (summary disposition) and *Meagher v Wayne State Univ*, 222 Mich App 700, 708; 565 NW2d 401 (1997) (directed verdict).

however, that ruling on whether there is a genuine issue of material fact, almost by definition, involves at least a threshold examination of the facts in order to determine the presence, or absence, of such a genuine issue. Thus, at the threshold under *Bertram* and its progeny – including *Lugo* – the first inquiry remains whether the condition in question was open and obvious. *If* the trial court reaches the conclusion that, as a matter of law, there is no genuine issue of material fact that the condition was open and obvious, *then* under *Lugo* it must consider whether there were "special aspects" of the open and obvious condition that would differentiate the risk posed by that condition from typical open and obvious risks so as to create an unreasonable risk of harm.

B. Subjective Versus Objective Standards

Perhaps because of the procedural peculiarities of this case, Kmart's basic contention is somewhat convoluted. Kmart argues that the risk the pallet posed was *objectively* open and obvious. But Kmart's support for this contention relies, at bottom, upon Dunkle's deposition testimony as to what *he* saw: Kmart's supplemental brief states:

> Further, and most importantly, [Dunkle] testified as follows:
>
> "*Q: If you're standing there looking at it, any difficulty seeing it?*
>
> *A: If I had been looking down, I would have probably seen it.*
>
> *Q: Any reason to believe that if you stand there and you're looking at it there's any difficulty about seeing it?*
>
> *A: If I'm standing back here, no. I can see the whole pallet and I can see the protrusion that goes out into the customer's aisle.*"
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> * * *
>
> "*Q: So it wasn't difficult to see if you were looking at it, right?*
>
> *A: If I were looking at it.*"
>
> * * *
>
> "*Q: So it was not difficult to see and it was in your path, and you did trip on it because you didn't see it, true?*
>
> *A: That's correct.*"
>
> * * *
>
> And again, most importantly, [Dunkle] testified as follows:
>
> "*Q*: *…and you look down at the uncovered portion of the pallet, is there any reason that you could not see it?*

A: You probably could have seen it, but I didn't look down…

Q: But we acknowledge that you could see it had you been looking at it, correct?

A: If I was lookin' down."

* * *

"Q: Let's assume that you had seen the protruding portion of the pallet before you came into contact with it. You would have had no difficult walking around it and going down the aisle; correct?

A: Not if I had seen it."[20]

Had the trial court granted summary disposition to Kmart based upon this testimony, its reasoning no doubt would have been similar to that of the trial court in *Lugo*: that Dunkle was "walking along without paying proper attention to the circumstances where he was walking." This would have been a subjective analysis, not one centering on the condition of the premises. As Justice Taylor outlined, under the rule of comparative negligence in Michigan, the fact that a plaintiff is also negligent would not bar a cause of action; where both the plaintiff and the defendant are culpable of negligence with regard to the plaintiff's injury, this reduces the amount of damages the plaintiff may recover but does not preclude recovery altogether.[21]

Thus, we conclude that, under *Lugo*, Kmart has placed the emphasis on the wrong aspect of this case. As stated by Justice Taylor, when courts decide summary disposition motions by premises possessors in "open and obvious" cases it is important to focus on the objective nature of the condition of the premises at issue, not the subjective degree of care used by the plaintiff. Here, we conclude that the trial court did just that.

It is well accepted that, when considering a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence available to it.[22] The party opposing the motion has the burden of showing that a genuine issue of material fact exists.[23] All inferences will be drawn in favor of the nonmovant.[24] A court must determine whether a record could be developed that would leave open an issue upon which reasonable minds could differ.[25]

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[20] Emphasis in the original; page references deleted. Note that the last excerpt is from Dunkle's trial testimony, not his deposition testimony.

[21] *Lugo, supra* at 523, citing *Riddle, supra* at 98.

[22] *Spiek v Dep't of Transportation*, 456 Mich 331, 338; 572 NW2d 201 (1998).

[23] *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994).

[24] *Dagen v Hastings Mutual Ins Co*, 166 Mich App 225, 229; 420 NW2d 111 (1987).

[25] *Novotney, supra* at 475.

Clearly, the trial court here considered the evidence before it, most notably Dunkle's deposition. Equally clearly, while recognizing that Dunkle had the burden of showing that a genuine issue of material fact existed, the trial court drew all inferences in his favor when it concluded that there was an issue of fact as to whether the risk posed by the pallet was open and obvious. Most importantly, the trial court focused not on the subjective degree of care used by Dunkle but, rather, on the objective nature of the condition of the premises at issue. Our de novo review therefore convinces us that there was a genuine issue of material fact as to the objective nature of this condition. Simply put, while it was objectively clear that the pallet itself was open and obvious, it was not objectively clear that the risk the pallet posed was open and obvious.

We reach the same conclusion with respect to the trial court's denial of Kmart's motion for directed verdict. Here again, the trial court's ruling demonstrates that it was applying an objective rather than a subjective standard. The trial court, again, did not refer to the subjective degree of care that Dunkle used. Rather, the trial court used the rubric of a "casual observer," signaling that its frame of reference was objective. Our de novo review convinces us that the trial court's approach was the correct one. Once again, we emphasize that *Lugo*, like the cases that precede it, involves a two-step analysis. The first step, at the summary disposition and directed verdict stage, is to determine whether there is a genuine issue of material fact as to whether the risk posed by the condition of the premises is open and obvious. The second step, again at the summary disposition and directed verdict stage, occurs *only* if the trial court determines that the risk posed by the condition of the premises is so open and obvious that, as a matter of law, there can be no genuine issue of material fact. Under such circumstances, the trial court must consider whether there were "special aspects" of the open and obvious condition that would differentiate the risk posed by such condition from typical open and obvious risks so as to create an unreasonable risk of harm.[26]

Here, the trial court, properly, did not reach the second step because, again properly, it had determined that there was a genuine issue of material fact as to whether the risk posed by the pallet was open and obvious. In *Lugo*, Justice Taylor commented on the question of the appropriate level of care. He indicted that "[t]he level of care used by a particular plaintiff is irrelevant to whether the condition created or allowed to continue by a premises possessor is unreasonably dangerous."[27] While Justice Taylor directed his comment at the "special aspects" step of the analysis, it is equally applicable to the "open and obvious" first step. Regardless of Dunkle's exercise of care – or lack of it – and regardless of what he saw – or didn't see – the question before the trial court was whether the risk the pallet posed was objectively open and obvious. The trial court concluded that it was not, and after de novo review, we agree.

Affirmed.

/s/ William C. Whitbeck
/s/ William B. Murphy
/s/ Jessica R. Cooper

[26] *Lugo*, *supra* at 517-518.

[27] *Id.* at 522, fn 5.