STATE OF MICHIGAN

COURT OF APPEALS

KENNETH MILLER,

Plaintiff-Appellant,

v

S M HONG ASSOCIATES, INC., d/b/a PRO-CLEAN, INC.,

Defendant-Appellee.

UNPUBLISHED
May 10, 2012

No. 302016
Genesee Circuit Court
LC No. 09-091086-NO

Before: M.J. KELLY, P.J., and FITZGERALD and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition in this premises liability action. Because the trial court did not err by determining that there was no genuine issue of material fact that the drain cover that caused plaintiff's fall was open and obvious, we affirm.

While carrying a laundry basket at defendant's laundromat, plaintiff tripped and fell on a drain cover, that was slightly elevated and not flush with the floor. Plaintiff testified that he was holding the laundry basket straight out in front of his body, slightly above hip level, and did not see the drain cover before he fell. The trial court granted summary disposition for defendant on the basis that there was no genuine issue of material fact that the drain cover was an open and obvious condition. Plaintiff appeals the trial court's ruling.

We review de novo a trial court's decision granting on a motion for summary disposition. *Driver v Naini*, 490 Mich 239, 246; 802 NW2d 311 (2011). "We review a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007). Summary disposition under subrule (C)(10) is properly granted if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Id*. at 552.

Generally, a premises owner is liable for physical harm that a dangerous condition on his land caused to invitees if he knew about the condition or could have discovered it through the exercise of reasonable care, and if he should have realized that the condition created an unreasonable risk of harm. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). A landowner's duty to exercise reasonable care, however, does not extend to open and

obvious dangers. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). "Where the dangers are . . . so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Id.*, quoting *Riddle v McClouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). Courts utilize an objective test to determine whether a condition is open and obvious. *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 119-120; 689 NW2d 737 (2004) (GRIFFIN, J., dissenting), adopted in 472 Mich 929 (2005). A condition is open and obvious if "an 'average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection.'" *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002), quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993) (brackets omitted). *Random House Webster's College Dictionary* (2001) defines "casual" as "happening by chance," "without definite or serious intention," and "off hand."

Applying these principles, the drain cover at defendant's laundromat was an open and obvious condition, and defendant therefore owed plaintiff no duty to protect him from harm caused by the cover. The photographs of the drain cover that plaintiff took a few days after his fall show that the cover is elevated from the floor, is a different color than the surrounding floor, and is made of a different material than the surrounding floor. Although many of the photos were taken inches from the floor and clearly depict that the cover was not flush with the floor, one photo appears to have been taken from eye-level and illustrates that a person looking down at the floor while walking would have seen that the drain cover was elevated.[1] This is not a case in which the parties contest that which is depicted in the photographs. Rather, both parties acknowledge that the photographs accurately depict the condition. Thus, plaintiff's own photographs demonstrate that an average person of ordinary intelligence would have been able to notice the cover with an "off hand" glance and "without definite or serious intention" to discover it. Further, plaintiff has presented no other documentary evidence, expert evidence, or lay opinion evidence addressing the objective nature of the condition on the premises.

Moreover, plaintiff testified that the lighting was adequate and that no light bulbs were out. No evidence indicates that he would have been unable to see the drain cover if he had been looking where he was walking. In fact, plaintiff testified that he would have been able to see the cover:

> *Q.* Okay. Now, when you're standing up looking down at the sewer cover, do you have any trouble seeing the sewer cover?
>
> *A.* When I'm standing up?
>
> *Q.* Yeah.

[1] In that photo, which plaintiff took a few weeks before his deposition, the drain cover was covered with duct tape. This is consistent with testimony indicating that duct tape was placed around the edge of the drain cover at some point after plaintiff's fall. The outline of the raised drain cover is clearly visible through the duct tape.

A. If I know it's there, I wouldn't have a problem with seeing it.

The fact that plaintiff did not discover the condition does not mean that a reasonably prudent person would not have discovered the condition with a quick glance at the floor. In fact, Sydney Kreklau, a longtime patron of the laundromat, testified that the drain cover was not difficult to see, she had noticed it many times, and she could see the cover "sticking up above the floor" from a standing position. Sydney's daughter, Karen Kreklau, similarly testified that she saw that the drain cover was "sticking up" from the floor.[2] Accordingly, the record shows that the condition itself, and any danger or risk associated with it, was readily noticeable to an "average user of ordinary intelligence . . . upon casual inspection." *Joyce*, 249 Mich App at 238.

Plaintiff argues that *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997), provides the proper test to be applied in this case, which is "not . . . whether plaintiff should have known that [the condition] was hazardous, but . . . whether a reasonable person in his position would foresee the danger." To that end, plaintiff contends that because most laundromat customers carry baskets of laundry in front of their bodies, obstructing the view of the floor, the hazard was not open and obvious to plaintiff because he was carrying a laundry basket and could not see the hazard. Plaintiff's argument, rather than employing an objective test, improperly focuses on his subjective knowledge of the condition. In determining whether a condition is open and obvious, however, courts utilize an objective standard and consider the objective condition of the premises rather than the subjective degree of care used by the plaintiff. *Lugo*, 464 Mich at 523-524. Applying an objective test, a reasonable person in plaintiff's position would have looked where he was walking, even while carrying a laundry basket, and would have been able to discover the drain cover upon casual inspection. In short, to rule that the hazard was not open and obvious because plaintiff did not see it because of circumstances unique to him would convert the open and obvious test from objective to subjective and run counter to established precedent. See, e.g., *Kenny*, 264 Mich App at 119-120 (GRIFFIN, J., dissenting), adopted in 472 Mich.

Plaintiff also argues that the condition was not open and obvious because Teresa Edwards, defendant's employee, testified that she had never noticed that the drain cover was raised. Because the open and obvious test is an objective one, the testimony of a witness's subjective impression, while evidence that a court may consider, is not dispositive of whether a condition is open and obvious. In any event, although Edwards never noticed that the drain cover was elevated, she also testified that nobody else had tripped on the drain cover during the nine years she had worked at the laundromat. Further, both Sydney Kreklau and Karen Kreklau testified that they had been coming to the laundromat for years and had noticed the drain cover many times. Sydney noticed it the first time that she used the restroom because the restroom is located around the corner from the drain cover, and Karen testified that she was worried that someone might trip on it. Edwards's testimony that she did not notice that the drain cover was

[2] While Karen did not see plaintiff fall, Sydney witnessed his fall, but did not see his foot touch the drain cover. Sydney merely assumed that plaintiff had tripped over the drain cover, which caused him to fall.

elevated, without more, was insufficient to create a question of fact regarding whether it was objectively open and obvious.

Finally, plaintiff argues that the trial court's ruling is at odds with Michigan's comparative negligence scheme, embodied in MCL 600.2958 and MCL 600.6304. To the contrary, in *Lugo*, 464 Mich at 524, our Supreme Court made clear that "any comparative negligence by an invitee is irrelevant to whether a premises possessor has breached its duty to that invitee in connection with an open and obvious danger because an invitee's comparative negligence can only serve to reduce, not eliminate, the extent of liability." In other words, comparative negligence will come into play only after a determination that a defendant was liable, which in turn requires a finding that the defendant owed a duty to invitees. Because "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," when a court finds that a hazard was open and obvious, comparative negligence will not be part of the analysis in the first instance, because the plaintiff will have failed to establish a prima facie case. *Id*. at 516. Thus, the trial court's ruling is not at odds with Michigan's comparative negligence scheme, as plaintiff contends.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio

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M. J. KELLY, P.J. (*dissenting*).

Because I conclude that plaintiff Kenneth Miller presented evidence that would permit a reasonable jury to find that the elevated drain tile was not the type of hazard that an average person of ordinary intelligence would discover upon casual inspection, I would reverse the trial court's determination to the contrary and, therefore, respectfully dissent. I believe that this case illustrates the error that too often occurs when a court is presented with the collision between the standards we are to apply in assessing whether a duty exists, which at times may be determined as a matter of law, and the standards applicable to a motion brought under MCR 2.116(C)(10). On the basis of this record, that conflict should be resolved in favor of finding a genuine issue of material fact. As such, I conclude that the trial court erred when it granted summary disposition in favor of defendant S. M. Hong Associates, Inc.[1]

[1] For ease of reference, I shall refer to defendant S. M. Hong Associates, Inc. as Pro-Clean, the name under which it does business.

Typically, whether a defendant had a duty cognizable at law is a question of law to be decided by the courts. See *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 95; 485 NW2d 676 (1992). And, because the open and obvious doctrine is intimately connected to the premises possessor's duty, whether a dangerous condition is open and obvious will normally be a question of law. See *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). As such, if "an average user with ordinary intelligence" would have discovered "the danger and the risk presented" by the condition at issue "upon casual inspection", then the danger is open and obvious and the premises possessor has no duty to warn about or rectify the hazard. *Novotney v Burger King Corp.*, 198 Mich App 470, 473-475; 499 NW2d 379 (1993), adopting the standard from *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 395-396; 491 NW2d 208 (1992). However, where there are factual disputes, which, depending on their resolution, may give rise to a duty, those facts must be resolved by a jury. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617; 537 NW2d 185 (1995).

In *Bonin v Gralewicz*, 378 Mich 521, 526-527; 146 NW2d 647 (1966), our Supreme Court explained the distinction between the role of the jury and the role of the trial court when determining whether a defendant had a duty:

> Usually, in negligence cases, whether a duty is owed by the defendant to the plaintiff does not require resolution of fact issues. However, in some cases, as in this one, fact issues arise. When they do, they must be submitted to the jury, our traditional finders of fact, for ultimate resolution and they must be accompanied by an appropriate conditional instruction regarding defendant's duty, conditioned upon the jury's resolution of the fact dispute.

Where the facts necessary to make a determination regarding the duty owed by a defendant to a plaintiff are not disputed, it is the trial court's responsibility to decide the legal import of those facts. However, if there are disputed facts, which, depending on how those facts are resolved, could alter the determination that the defendant owed a duty to the plaintiff, those facts must be submitted to the jury with an appropriate instruction. *Id.* Accordingly, in a premises liability case, if there are factual questions that implicate whether a dangerous condition is open and obvious, or has special aspects that make it unreasonably dangerous notwithstanding its open and obvious character, the jury must resolve those disputes. See *Bertrand*, 449 Mich at 617 ("If the proofs create a question of fact that the risk of harm was unreasonable, the existence of duty as well as breach become questions for the jury to decide."); *Slaughter v Blarney Castle Oil Co.*, 281 Mich App 474, 484; 760 NW2d 287 (2008) (concluding that there were questions of fact as to whether the ice was open and obvious).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). And, in evaluating such a motion, the trial court may not assess credibility or determine the facts. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Rather, it must consider the parties' affidavits, pleadings, depositions, admission, and other evidence in the light most favorable to the non-moving party. *Maiden*, 461 Mich at 120. Only when the evidence fails to establish a genuine issue regarding any material fact should the trial court grant the motion. *Id.* There is a genuine issue of material fact when, giving the benefit of reasonable doubt to the nonmoving party, the record leaves open an issue upon which reasonable minds might differ.

West v Gen Motors Corp, 469 Mich 177, 183; 665 NW2d 468 (2003). Stated another way, a trial court properly grants summary disposition when it appears that, even when viewing the evidence in the light most favorable to the nonmoving party, no reasonable jury could find for the nonmoving party. See *Bertrand*, 449 Mich at 623 (stating that the "plaintiff did not allege a jury submissible claim for liability based on a failure to warn theory because no reasonable juror would disagree that the danger of falling was open and obvious.").

Here, Miller patronized Pro-Clean's business for the first time in February 2008 to do his laundry. At his deposition, he testified that he carried a basket of laundry over to a vending machine in the Laundromat, purchased a beverage, and then began walking back to a washing machine. On the way back, he tripped over a drain cover that was not flush with the floor and "fell hard." Although he testified that he was carrying a basket when he tripped, at no point did he testify that he did not see the drain cover because he was carrying the laundry basket. While one might infer from his testimony that the laundry basket obscured his view of the floor, there simply is no testimony to establish that this was the case. Indeed, Miller testified that he did not see the drain cover at any point before he tripped. He explained: "It wasn't like I was on the ground looking trying to see what I could trip over or anything." Taking this testimony in the light most favorable to him, which we must, the testimony permits an inference that he would not, and could not, have noticed the hazard without getting "on the ground."

Just as we are not to assess credibility or determine the facts in a motion for summary disposition under MCR 2.116(C)(10), neither are we to make inferences in favor of the moving party. *Skinner*, 445 Mich at 161. Instead, we must consider the evidence in a light most favorable to the non-moving party—Miller. It was up to the lawyers at the deposition to flesh out whether his view was obscured by the basket, not for the reviewing court to divine this fact from inferences in the testimony, especially in favor of the moving party.[2]

[2] The majority makes such an inference by noting that Miller was carrying a laundry basket at hip level (a fact Sydney Kreklau denies) and later indicating that he testified that he "would have" been able to see the cover. Indeed, the majority even cites Miller's testimony that he could "see the cover" when standing and looking down at it. But, as I explain, there is no disagreement whatsoever that the "drain cover" is plainly visible—even open and obvious. The dispute is whether "its danger" (not being flush with the floor and thus a trip hazard) is open and obvious. Moreover, even if Miller had identified the danger of the cover in a photograph, this does not necessarily establish that the condition was discoverable upon casual inspection. Certainly, after his trip and fall, Miller noticed the condition, as he was on the ground and could then more readily identify it after knowing of its existence. This is similar to a person who slips on black ice (a condition that, though not literally invisible, is very difficult to see). Once the person falls and knows the black ice is there, it can be more easily identified. In neither case, however, does it necessarily follow that an average person of ordinary intelligence would have seen the danger upon casual inspection.

Few other witnesses were deposed. However, Pro-Clean's employee, Teresa Edwards, who had worked at the Laundromat for nine years and additionally had the duty of sweeping and mopping the floors, testified that she had never noticed that the drain cover was not level with the floor and, had she noticed it, she would have reported it to the manager. In interrogatory responses, Pro-Clean stated that Edwards' duties also included inspecting the premises. Another customer, Sydney Kreklau, testified at her deposition that she saw Miller trip and fall: he tripped "where the sewer thing was and as far as I can figure out his toes hit the thing and he just went flat on his stomach" with "both arms out. . . ." She stated that other people had also tripped and stumbled over the drain in the twenty years she had been going to the business. Following Miller's fall, her adult daughter, Karen Kreklau, went to speak with the manager, but he just "laughed and went the other way. And he sent the girl to go mop up the pop." Both of these witnesses, however, testified that they had noticed that the drain cover was raised above the ground.

Sometime after Miller's fall, he returned to the Laundromat and took a series of photographs. Ten of those photographs were produced in discovery and attached to the motion for summary disposition. All the photos were taken from the same direction; they do not cover every possible angle of approach. Hence, the trial court was mistaken when it asserted that the photographs show that the drain cover was "noticeably raised" from *any* angle. In addition, the only photographs that clearly show that the drain cover rose above the level of the floor were taken from what appears to be just inches above the floor, which is not from the perspective of an average user walking along and casually inspecting the premises. The photographer also did not photograph the drain cover with a ruler that would provide an objective measure of the drain cover's elevation above the floor. Similarly, the photographer did not place some well-known object in the frame that would give the viewer some perspective as to how noticeable the trip hazard might have been. Miller presented two additional photos that provided some perspective: the photos show that the drain cover was relatively small in diameter and in close proximity to a manhole cover and a laundry machine. The drain cover's proximity to the manhole cover and machine might have some effect on an average user's ability to notice the raised character of the drain cover. In those two photos, the drain cover's edge has also been covered with duct tape which was placed on the drain after the incident, which provides some contrast and suggests that the drain cover's protrusion from the floor's surface was subtle enough that it would not be noticed without the contrast.

Importantly, however, there is no testimony from any witness that these photographs accurately depict the condition as it existed and—even more importantly—that it depicts the protrusion from the angle that an average person of ordinary intelligence would have had at the time of Miller's fall. Nevertheless, the majority states that a photo taken from eye-level "illustrates that a person looking down at the floor while walking would have seen that the drain cover was elevated." I disagree. The majority also states that "the parties do not contest that which is depicted in the photographs" and that "the photographs accurately depict the condition." But they don't. And the parties do not agree that they do; there is no such agreement in the record. The fact that a person lays a camera on the floor to take a photograph so that the viewer can actually see the hazard does not mean that the hazard can be seen by an average person of ordinary intelligence at eye level while walking.

It appears as though the trial court and, presumably, the majority, followed defense counsel's charge at the summary disposition hearing: "I think, your Honor, as this Court's well aware, it's an objective standard; you look at the picture, you make the determination." As explained below, a court cannot make this determination in every case in which a photograph is produced.

It is also apparent from the trial court's discussion of the evidence at the hearing that it gave dispositive weight to these photographs in making its determination that there was no question of fact that the drain cover constituted an open and obvious danger. It explained that the photos showed an obvious "contrast between the color of the drain cover and the color of the floor" and showed that the "cover is noticeably raised above the surrounding floor when looking at it from any angle except when looking down from directly above." Although the photos clearly demonstrate that the *drain cover* was obvious in the sense that an average user of ordinary intelligence would see it on casual inspection, it must be remembered that the fact that the drain cover is itself easy to see does not necessarily render *its danger* open and obvious—the test is whether an average user of ordinary intelligence would discover the *specific danger* or *risk* posed by the condition on casual inspection. *Glittenberg*, 441 Mich at 394; *Novotney*, 198 Mich App at 473-475; 2 Restatement Torts, 2d, § 343A, comment 1(b), p 219. Here, the dangerous characteristic was that the drain cover protruded above the level of the floor and created a risk that one might trip and fall over it. The relevant inquiry then is not merely whether an average user of ordinary intelligence would notice the drain cover on casual inspection, but whether an average user of ordinary intelligence would notice that the drain cover rose above the surface of the floor.

Examining these photos in context, a finder-of-fact *might* reasonably conclude that the drain cover's protrusion from the floor was sufficiently noticeable that an average user of ordinary intelligence would notice it on casual inspection. But a reasonable finder-of-fact also *might* conclude that the photos establish that the hazard posed by the drain cover was not sufficiently obvious that an average user would notice it on casual inspection. This is especially true given the inherent limitations that are plainly evident with these photos. Thus, considering the photos as a whole, and making every reasonable inference in Miller's favor, a reasonable juror might find that the hazard presented by the drain cover was not so obvious that an average user of ordinary intelligence would discover it on casual inspection. *Novotney*, 198 Mich App at 473-475. Accordingly, the trial court erred to the extent that it concluded, on the basis of the photos alone, that Miller's case should be dismissed because the drain cover was an open and obvious hazard.[3]

[3] As can be seen from the facts of this case, while photographs can be extremely helpful evidence, the reviewing court must be careful not to accord them greater weight than other evidence. A photographer can deliberately or inadvertently photograph the condition in a way that presents a distorted view that varies widely from that experienced by an average user of the premises. Indeed, even something as simple as the use of a camera's flash mechanism can radically alter the appearance of the condition by artificially illuminating it in a way that does not

Miller testified that he did not notice it and he suggested that he would have had to have been on hands and knees to discover the hazard. Likewise, Edwards testified that she had been sweeping the floors for nine years and never noticed the hazard. And Edwards' testimony that she had not discovered the hazard after nine years of inspecting the premises—if believed—strongly suggests that the raised character of the drain cover was not the kind of hazard that an average user of ordinary intelligence would discover on casual inspection.[4] Consequently, there was testimony that—in addition to the photos—established a question of fact about the nature and character of the hazard posed by the drain cover that had to be resolved by a jury. *Skinner*, 445 Mich at 161-162.

The trial court erred when it failed to consider the inferences that might be made from the photos that favored Miller's position and failed to consider the testimony that permitted an inference that the drain cover's dangerous character was not so pronounced that an average user of ordinary intelligence would have discovered it on casual inspection. The trial court inappropriately gave greater weight to the photographic evidence than the witness testimony and concluded that—despite their inherent limitations—the photos definitively established that the drain cover presented an open and obvious danger. The majority, I believe, makes the same error. When the evidence is considered as a whole and in the light most favorable to Miller, there is a question of fact as to whether an average user of ordinary intelligence would discover the danger and risk presented by the drain cover on casual inspection.[5] Consequently, I conclude that the trial court erred when it granted summary disposition in favor of Pro-Clean and would reverse and remand for further proceedings.

/s/ Michael J. Kelly

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accurately reflect ordinary perception—and, in particular, the way the condition might have appeared at the time of the injury.

[4] In stark contrast to Miller's duty to make casual inspection, under premises liability law, Pro-Clean had an affirmative duty to inspect its premises for hazardous conditions. See *Stitt*, 462 Mich at 597. Thus, Edward's testimony is particularly relevant because she was apparently the only employee who regularly inspected the premises.

[5] This is not to say that Pro-Clean could not have built a record that would warrant the grant of summary disposition. Had Pro-Clean presented photographs that clearly depict the hazard from the perspective of an average user and in a way that showed the hazard's obvious character such that no reasonable jury could find that an average user of ordinary intelligence would not have noticed it on casual inspection, then Pro-Clean would be entitled to summary disposition. But Pro-Clean has not met that burden.