Court of Appeals, State of Michigan

ORDER

Jeff Becker v Enterprise Leasing Company of Detroit LLC

Docket No. 351312

LC No. 2018-003200-NO

Christopher M. Murray
Presiding Judge

Kathleen Jansen

Cynthia Diane Stephens
Judges

On the Court's own motion, the September 16, 2021 opinion is hereby AMENDED as follows to correct clerical errors.

The third paragraph on page 4 is corrected to read:

Regarding any claim that there is a genuine issue of material fact on whether the raised sidewalk was an open and obvious condition because (1) plaintiff's own testimony conflicts as to the level of darkness at the time, and (2) it is difficult to discern the height discrepancy of the raised sidewalk from the photo above, neither of these arguments require reversal.

The second sentence on page 5 is corrected to read: The differential was "minor," and the photo clearly exhibits that fact.

In all other respects, the September 16, 2021 opinion remains unchanged.

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

December 21, 2021
Date

Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

JEFF BECKER,

Plaintiff-Appellant,

v

ENTERPRISE LEASING COMPANY OF DETROIT LLC,

Defendant-Appellee.

UNPUBLISHED
September 16, 2021

No. 351312
Macomb Circuit Court
LC No. 2018-003200-NO

Before: MURRAY, C.J., and JANSEN and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(1). For the reasons expressed below, we affirm.

I. FACTS

At approximately 9:00 p.m. on a spring night, plaintiff tripped and fell on a sidewalk located behind one of defendant's service buildings. The only evidence available regarding the incident was plaintiff's deposition testimony and exhibits depicting the area in which he fell. According to plaintiff, when he proceeded around the back of defendant's rental building as a short-cut[1] to his personal vehicle, he realized it was dark behind the building. Plaintiff testified that while proceeding behind the building on the sidewalk, he *saw* two black pilings sticking out of the sidewalk next to the building (as well as two vehicles parked on the grass). He moved to his left to avoid the black poles, and tripped on the raised sidewalk. The raised sidewalk that plaintiff claims caused his fall is exhibited in the photograph taken by plaintiff of the location as it appeared during daylight hours:

[1] Plaintiff realized that he could walk around the front of the building, where it was illuminated by lighting, to get to his vehicle, but thought it was a shorter walk going behind the building.

Plaintiff testified he did not see the raised sidewalk and did not know if it was visible at the time, as were the poles and vehicles parked behind the building, because he was not looking down as he moved forward.

II. ANALYSIS

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 693; 822 NW2d 254 (2012) (quotation marks and citation omitted). Although "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," *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001), "[t]he possessor of land owes no duty to protect or warn of dangers that are open and obvious . . . ." *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012) (quotation marks and citation omitted). "The standard for determining if a condition is open and obvious is whether an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 478; 760 NW2d 287 (2008) (quotation marks and citation omitted) (alteration in original). "The test is objective, and the inquiry is 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." *Id*. at 479.

The dispositive question is whether the darkness presented to plaintiff while he walked along the sidewalk created a genuine issue of material fact as to whether the raised sidewalk was to an average user discoverable upon casual inspection. Under the guiding principles, the answer is no. *Knight v Gulf & Western Props, Inc*, 196 Mich App 119; 492 NW2d 761 (1992), *Abke v Vandenberg*, 239 Mich App 359; 608 NW2d 73 (2000), and *Blackwell v Franchi*, 318 Mich App 573; 899 NW2d 415 (2017), either support this conclusion or do not detract from it.

Knight is particularly illuminating. There, the plaintiff was showing a vacant warehouse to potential buyers, and he was told that the warehouse had exterior loading docks, but not interior ones. *Knight*, 196 Mich App at 127. As the plaintiff was preparing to leave, he turned off the lights inside the warehouse, turned, and fell into an interior loading dock. *Id*. at 121. On review of the trial court's denial of the defendant's requested jury instruction on the open and obvious element of duty, our Court held that the court did not abuse its discretion by not giving the instruction, as the plaintiff had no reason to anticipate encountering a loading dock in the interior part of the warehouse:

> The fact that defendant's vacant warehouse was not adequately lighted was both obvious and known to plaintiff, *but there was no evidence that he was aware or had reason to anticipate that there were interior loading docks that otherwise were not marked or blocked off*. Certainly there was no need to warn plaintiff of the dark. However, there was no evidence that plaintiff could intelligently choose not to encounter the hidden risk posed by the recessed loading dock. The claimed cause of plaintiff's injuries was not simply a dark warehouse*; the claimed defect that allegedly caused plaintiff's injuries was an unknown, unexpected, and unseen drop-off, which was claimed to be virtually undetectable in the dark interior*. Plaintiff was told that there were loading docks, and the exterior docks were open and obvious, but the specific location of one of the docks in the interior of the warehouse was not disclosed and plaintiff had no reason to know or expect that there were interior docks without a warning from defendant. [*Id*. at 127 (emphasis added).]

As recognized in the above quote, in *Knight*, there was no reason for the plaintiff to anticipate an interior loading dock, and the darkness prevented him from seeing the loading dock, thus making it "virtually undetectable." *Id*. Here, however, the law has long stated that minor differential height difference in sidewalks is not unexpected. See *Weakley v Dearborn Hts*, 240 Mich App 382, 385; 612 NW2d 428 (2000), remanded for reconsideration on other grounds 463 Mich 980 (2001) ("steps and differing floor levels, such as . . . uneven pavement . . . , are not ordinarily actionable unless unique circumstances surrounding the area in issue made the situation unreasonably dangerous."), *Bertrand v Alan Ford, Inc*, 449 Mich 606, 616; 537 NW2d 185 (1995); see also *Lugo*, 464 Mich at 520, and *Novotney v Burger King Corp*, 198 Mich App 470, 474; 499 NW2d 379 (1993). Because such a condition on a sidewalk is not unusual and is to be anticipated by a reasonable person, *id*., the darkness testified to by plaintiff had no impact on whether the condition of the land was open and obvious. In other words, a premises owner is entitled to expect that an invitee would, when walking in the dark along a sidewalk on the property, anticipate the possibility of a minor height differential, and discover it on casual inspection.

Neither *Abke* nor *Blackwell* compel a different conclusion. In *Abke*, the plaintiff also fell off a loading dock and testified (contrary to an employee of the defendant) that the area was dark because the lights were not working. *Abke*, 239 Mich App at 362. This Court held that there was a genuine issue of material fact as to whether the loading dock was readily apparent upon casual inspection given the material dispute as to whether the lights were functioning at the time. *Id*. Here, there is no dispute about the existence of lighting, and what plaintiff encountered here was an everyday experience, not an unexpected, large, open pit-like area. In *Blackwell*, the Court held that there was a question of fact as to whether a drop-off between the floor in a hallway and the floor in a dark mud room was open and obvious, given witness testimony that the height differential could not be seen, and "photographs submitted by the parties also demonstrated that the drop-off was not easily seen, even with sufficient lighting." *Blackwell*, 318 Mich App at 578. Again, the raised sidewalk here was clearly visible with sufficient lighting and did not present an unexpected condition, unlike the eight-inch drop-off into the mud room in *Blackwell*.

A more difficult question is what effect darkness has on an ordinary, to-be-expected condition on the land. No decision has concluded that the existence of darkness alone creates a genuine issue of material fact as to whether a condition is discoverable upon casual inspection. But, caselaw does instruct that we apply the objective standard to the circumstances presented to the plaintiff at the time of the injury, *Slaughter*, 281 Mich App at 479, and *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 94; 485 NW2d 676 (1992), and as noted at least two of the Courts that address darkness in this context seemed to focus in part on how *unexpected* the defect was in the location, and according to one panel, even when viewed in daylight. See *Blackwell*, 318 Mich App at 578, 581 ("plaintiff was directed to place her coat in a completely dark room preceded by a step that was unexpected and invisible on casual inspection.") (GLEICHER, J., *concurring*); *Knight*, 196 Mich App at 127-128 (recognizing that the plaintiff had no reason to anticipate the loading dock in the interior of the warehouse). Here, as noted, in light of the visibility testified to by plaintiff, we hold that the not unusual height disparity of the uneven sidewalk was readily observable upon casual inspection, and therefore there was no duty to warn.

The dissent concludes that there is a genuine issue of material fact on whether the raised sidewalk was an open and obvious condition because (1) plaintiff's own testimony conflicts as to the level of darkness at the time, and (2) it is difficult to discern the height discrepancy of the raised sidewalk from the photo above. Neither of these arguments require reversal.

With respect to plaintiff's testimony, it does not conflict. Although plaintiff generally described the area as being in "total darkness," when he testified *specifically* as to what he could or could not see as he traversed the area, he testified that he *could* actually see objects as he walked behind the building. Hence, his testimony that he could see the black poles before he encountered them modifies his general testimony about the area being in "total darkness," but is not an inconsistency creating a genuine issue of material fact. Consequently, under the standard governing motions filed under MCR 2.116(C)(10), we must accept as true that it was dark behind defendant's building as plaintiff proceeded along the sidewalk, but not "total darkness" because it is undisputed that plaintiff saw the two black poles and cars as he walked along the sidewalk. There is also no factual dispute about whether the darkness would have prevented a reasonable person from seeing the uneven sidewalk, as plaintiff testified that he never looked down as he was walking, and thus does not know whether the height disparity that he tripped on was visible upon casual inspection.

Additionally, whether the "precise" height differential of the sidewalks is known is also not material. The dissent recognizes that the differential was "minor," and the photo clearly exhibits that fact.[2] The "precise" differential is not material because our Courts generally have held that steps and differing ground levels are "everyday occurrence[s] that people encounter" and constitute open and obvious conditions unless there is something unusual about the steps or uneven floor. *Bertrand*, 449 Mich at 616; *Lugo*, 464 Mich at 520; *Novotney*, 198 Mich App at 474, and *Weakley*, 240 Mich App at 385.

A minor height discrepancy is not considered, under our caselaw, to be an unexpected condition on a sidewalk. Even with the relative darkness confronted by plaintiff that night, there was no genuine issue of material fact that, objectively speaking, an average person with ordinary intelligence would have discovered it upon casual inspection.

Affirmed.

/s/ Christopher M. Murray
/s/ Kathleen Jansen
/s/ Cynthia Diane Stephens

[2] The parties agree that the photo accurately depicts the area in daylight.