2011 Ill. App. (2d) 110122-U
No . 2-11-0122
Order filed September 29, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MELISSA LILJA,	)	Appeal from the Circuit Court
	)	of Ogle County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 09-L-33
	)	
PAULINE HUMPHREYS,	)	
	)	
Defendant-Appellee	)	Honorable
	)	Stephen C. Pemberton,
(Clarence Buskohl, Third-Party Defendant).	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Schostok concurred in the judgment.

ORDER

Held: The trial court properly granted summary judgment in favor of defendant as defendant had no duty to plaintiff under sections 388 or 392 of the Restatement (Second) of Torts.

¶ 1 Plaintiff, Melissa Lilja, appeals an order of the circuit court of Ogle County granting summary judgment in favor of defendant, Pauline Humphreys. On July 27, 2009, plaintiff filed a complaint sounding in negligence. The trial court held that defendant had no duty to plaintiff under the facts of this case. For the reasons that follow, we affirm.

¶ 2 Defendant purchased a home in Mount Morris in the spring of 2006. Plaintiff assisted defendant in remodeling the home. Plaintiff was a friend of defendant and received no compensation for her work. They met when defendant started doing plaintiff's hair. Included in the remodeling project was turning a portion of the home into a home business, namely, a beauty salon.

¶ 3 On September 3, 2007, plaintiff was working on the remodeling project. A table saw owned by defendant's father (third-party defendant Clarence Buskohl, who is not a party to this appeal) was in the garage. Plaintiff went to use the saw. There was no guard on the blade of the saw. Plaintiff was aware that the saw did not have a guard on it. When she turned the saw on, an object flew up and struck her in the face. As a result, she flinched and turned away from the saw. Plaintiff dragged her hand across the blade, cutting all four of her fingers. Prior to this date, plaintiff had taken wood home and her husband had cut it using a table saw at plaintiff's house.

¶ 4 Defendant moved for summary judgment. The trial court granted the motion, concluding that there was no duty from defendant to plaintiff. It explained that defendant had acquiesced in plaintiff's request to use the saw as a favor to plaintiff, as plaintiff otherwise would have taken the wood home with her. It also noted that plaintiff had more experience with table saws and was aware that the saw lacked a guard. The trial court held that, because the danger was open and obvious, no duty to warn had existed. The court expressly analyzed the case under two sections of the Restatement (Second) of Torts. See Restatement (Second) of Torts §388, § 392 (1965).

¶ 5 Summary judgment is appropriate if the "pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2010). The record must be construed in the light most favorable to the nonmoving party. *People ex el. Department of Public Health v. Wiley*, 218 Ill. 2d 207, 220 (2006). Because it is a drastic

means of disposing of litigation, summary judgment should be granted only when the moving party's right to judgment is clear and free from doubt. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). Review is *de novo*. *Millennium Park Joint Venture, LLC v. Houlihan*, 241 Ill. 2d 281, 309 (2010).

¶ 6 The parties spend much of their briefs arguing as to which Restatement section applies. Defendant contends that section 388 controls. That section provides as follows:

> "One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier
>
> (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
>
> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
>
> (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous." Restatement (Second) of Torts §388 (1965).

Plaintiff, on the other hand, relies upon section 392, which states:

> "One who supplies to another, directly or through a third person, a chattel to be used for the supplier's business purposes is subject to liability to those for whose use the chattel is supplied, or to those whom he should expect to be endangered by its probable use, for

> physical harm caused by the use of the chattel in the manner for which and by person for whose use the chattel is supplied
>
> (a) if the supplier fails to exercise reasonable care to make the chattel safe for the use for which it is supplied, or
>
> (b) if he fails to exercise reasonable care to discover its dangerous condition or character, and to inform those whom he should expect to use it." Restatement (Second) of Torts §392 (1965).

The latter applies when the chattel is used for the supplier's business purpose; the former applies when a chattel is supplied for another to use, regardless of the purpose for which it is supplied. See Restatement (Second) of Torts §392, Comment *a* (1965).

¶ 7 We initially register our disagreement with the trial court's analysis of section 392. The trial court concluded that the danger in this case was open and obvious. We have no quarrel with that conclusion. The trial court correctly concluded that this would be a bar to plaintiff's recovery under section 388. See *Quinton v. Kuffer*, 221 Ill. App. 3d 466, 472-73 (1991). However, the trial court, relying on foreign authority, concluded that the open and obvious nature of the danger also militated against finding a duty under section 392. Section 388 imposes a duty to warn. Restatement (Second) of Torts §388(c). Conversely, section 392 imposes duties to inspect (Restatement (Second) of Torts §392(a)) and to make the chattel safe (Restatement (Second) of Torts §392(b)). In *Blue v. Environmental Engineering, Inc.*, 345 Ill. App. 3d 455, 463 (2003), the court held, "Where, however, the duty of care owed by the defendant extends beyond the giving of a warning, the open and obvious nature of the risk can no longer serve as an absolute bar." Thus, the mere fact that the danger was open and obvious cannot be deemed a bar to recovery absent further analysis.

¶ 8 We note the trial court relied on *Fritz v. Yeager*, 790 A.2d 469, 471 (Del. Super. Ct. 2002), which, after quoting section 392, held:

> "Under Delaware law, the duty to warn extends only to those who can reasonably be assumed to be ignorant of the danger. Where the user has actual knowledge of the alleged danger, there is no duty to warn. [Citation.] In this case, the Superior Court held that [the defendant's] duty to warn or make the saw safe was discharged because of [the plaintiff's] superior knowledge of the saw's dangerousness."

We find *Fritz* unpersuasive in light of the fact that it treated section 392 as imposing a duty to warn when, by its plain language, it actually imposes duties far beyond that. The trial court also relied on *Dingler v. Moran*, 224 Ga. App. 59 (1996); however, that case does not address section 392.

¶ 9 Nevertheless, the open and obvious nature of the risk might be a bar to recovery under section 392 unless some additional conditions exist. *Blue*, 345 Ill. App. 3d at 464. For example, in a premise-liability case, liability would attach despite the open and obvious nature of the risk if "the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk." *Blue*, 345 Ill. App. 3d at 465, quoting Restatement (Second) of Torts §343A, Comment *f* (1965). Following this logic, a duty would exist on defendant's behalf if it was foreseeable that plaintiff would use the saw despite the absence of the guard because the advantages of doing so outweighed the risk. Further, we do not think it inappropriate to impose such a heightened duty when section 392 applies. That section imposes what it terms a "peculiar liability" because it only applies in situations where the supplier of the chattel has a business interest. Restatement (Second) of Torts §392, Comment *a* (1965). Accordingly, if section 392 applies, questions of material fact exist whereas if section 388 controls, summary judgment was proper.

¶ 10 This brings us back to the question of whether the chattel was to be used for defendant's business purpose. The trial court held that it was not. Relevant here, section 392 contains the following provision pertaining to supplying tools to workmen:

> "One who employs another to erect a structure or to do other work, and agrees for that purpose to supply the necessary tools and temporary structures, supplies them to the employees of such other for a business purpose. This is true irrespective of whether the structure or work when finished is to be used for business or residential and social purposes. On the other hand, if it is understood that the person who is to do the work is to supply his own instrumentalities, but the person for whom the work is to be done permits his own tools or appliances to be used as a favor to the person doing the work, the tools and appliances are supplied as a gratuity and not for use for the supplier's business purposes." Restatement (Second) of Torts §392, Comment *e* (1965).

Thus, the Restatement distinguishes between situations where there is an agreement to supply the tools necessary to the furtherance of some business purpose and situations where the tools are supplied as a favor to the person doing the work. See also *Bogard v. Mac's Restaurant, Inc.*, 530 N.E.2d 776, 779 (Ind. Ct. App. 1988) ("Such a duty is imposed on the supplier because the chattel is to be used for the supplier's business purpose. *See, e.g.* Restatement (Second) of Torts §388 comment *m*, *f*, §392 comment *a* (1965). Restatement §392 comment *e* makes clear that the affirmative duty to inspect stems from the supplier's promise to furnish the necessary tools in furtherance of its business purpose; where use of the chattel is permissive, the chattel is supplied gratuitously and not in furtherance of the supplier's business purpose").

¶ 11 In this case, plaintiff's use of the table saw was permissive. Defendant neither employed plaintiff nor did she make a promise to supply plaintiff with the instrumentalities necessary to

remodel the house. Rather, this was simply a case of one friend aiding another. We recognize that there was also no understanding that plaintiff was to supply her own instrumentalities, as mentioned in the Restatement. See Restatement (Second) of Torts §392, Comment *e* (1965). We find it more significant that no agreement existed for defendant to supply tools to plaintiff, as that is the scenario under which the Restatement contemplates a duty would arise.

¶ 12 In sum, we hold that under section 388, no duty exists on defendant's behalf due to the open and obvious nature of the danger and that under section 392, no duty exists as the table saw was not provided to plaintiff in furtherance of a business purpose. We therefore affirm the judgment of the circuit court of Ogle County.

¶ 13 Affirmed.