2013 IL App (3d) 121046-U

Order filed September 25, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

RAYMOND SMITH,	)	Appeal from the Circuit Court
	)	of the 13th Judicial Circuit,
Plaintiff-Appellant	)	La Salle County, Illinois,
	)	
v.	)	
	)	
MARTIN G. MYRE and MYRE FARMING ENTERPRISES, a Corporation,	)	Appeal No. 3-12-1046
	)	Circuit No. 10-L-119
	)	
Defendants-Appellees	)	
	)	
(Richard Timmons and Raymond Timmons,	)	Honorable
	)	Eugene P. Daugherity,
Defendants).	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Wright and Justice McDade concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court improperly granted summary judgment in favor of defendants where a material question of fact existed as to whether a hole in the guard on the farm equipment constituted an open and obvious condition.

¶ 2 Plaintiff, Raymond Smith, filed a negligence complaint against defendants, Martin

G. Myre and Myre Farming Enterprises (Myre Farming), for injures he sustained when he stepped through a hole in an auger and lost his leg. The trial court found that the condition of the equipment was open and obvious and granted summary judgment in defendants' favor. On appeal, Smith argues that (1) the trial court erred in concluding that the condition was open and obvious as a matter of law, and (2) if the condition was open and obvious, the deliberate encounter and distraction exceptions apply to preclude summary judgment. We reverse and remand for further proceedings.

¶ 3 Ray Smith was employed by Myre Farming, a business owned and operated by Martin G. Myre. Myre Farming owns and leases more than 10,000 acres of farmland. On the day of the accident, October 23, 2009, Smith was unloading soybeans into a bin at a farm north of Interstate 80 (I-80 site) using a portable Westfield auger. The beans were unloaded from a trailer into a hopper. The hopper received the beans at the lower end of the auger and was covered by a wire screen, or guard, to prevent objects from entering the auger. The guard allowed beans to pass through the hopper and into the auger. The auger then carried the beans up a shoot and into the bin. The guard on the hopper in this case had an 8 inch by 10 inch hole cut into it directly over the area where the hopper connects to the auger joint. Richard Timmons, the owner of the auger, testified that years earlier, he cut the hole in the guard to repair a broken universal joint.

¶ 4 Three or four days before the accident, Myre sent Smith and another employee to pick up the portable auger from the Timmons farm. Myre testified that he borrowed the auger because the auger he would normally use at the I-80 site was being used at another location. Myre Farming had four Westfield augers almost identical to the Timmons auger. Smith had

used defendants' Westfield augers on prior occasions. The other augers did not have a hole cut into the guard of the hopper.

¶ 5 During his deposition, Smith testified that he talked to Timmons while Timmons greased the universal joint through the hole. He admitted that he noticed the hole in the hopper when he picked it up and that he did not tell Myre that there was a hole in the guard. Myre Farming did not use the auger for three or four days between the time it was picked up and the date of the accident because it was broken. After the auger was repaired, it was moved to the I-80 bin site, where it remained until the accident. Smith testified that Myre Farming had 10 to 20 bin sites at which he was responsible for unloading grain. Each site usually had its own tractor, auger and hopper for unloading.

¶ 6 Smith stated that on the day of the accident, he did not notice the hole in the guard when he moved the hopper to unload the truck. The truck he was unloading at the time of the accident was the only truck he unloaded at the I-80 site that day. The work area was muddy because it had recently rained. Smith moved the hopper into position to match the trailer dumping gate. His co-worker, Mark Wilbur, then started the power to the auger. Smith stood on the side of the hopper furthest from the bin, monitoring the flow of beans. Not all the beans were going into the hopper. Some of the beans fell onto a tarp that had been placed on the ground underneath the hopper.

¶ 7 After about 10 or 15 minutes, Smith and Wilbur had unloaded half of the truck, and Smith decided to go check the bin as the beans were unloading. Smith said he could have walked around the machinery to get to the bin but that would have required him to walk around the truck or the tractor. He used the fastest route because he did not want the bin to

overflow.

¶ 8 Smith started to go across the hopper at an angle. He testified that walking over the hopper was "easy" for him to do because he was six feet two inches tall. Smith stated that he knew it was dangerous to step on the hopper. As Smith attempted to step over the hopper, he slipped. His right foot landed on top of the hopper and went through the hole and became lodged in the auger. Smith testified that he did not see the hole in the hopper because the hopper was covered with beans.

¶ 9 Mark Wilbur testified that Smith tried to "hop" over the hopper. Wilbur stated that he, too, was unaware of the hole in the hopper. He testified that the guard on top of the hopper was invisible. He described the hopper as "a basket of beans." Wilbur stated that he did not realize that Smith's leg was stuck in the auger until he put his hand into the beans and cut his thumb on Smith's exposed bone.

¶ 10 Smith filed a negligence complaint against Myre and Myre Farming, claiming that defendants had a duty to provide him with a safe workplace, failed to adequately inspect the hopper and auger, failed to identify or notify him of the dangerous condition and failed to properly repair the hopper prior to using it. Following discovery, defendants filed a motion for summary judgment, claiming that the danger arising from the hole in the auger was apparent and known to Smith prior to the accident.

¶ 11 The trial court granted defendants' motion. The court found that Myre and Myre Farming had a duty to provide a safe workplace for Smith, which included the use of safe machinery. However, it concluded that defendants' duty was negated because the condition of the hopper was "open and obvious" when Smith retrieved the auger from the Timmons

farm.

¶ 12 STANDARD OF REVIEW

¶ 13 Summary judgment is proper when the pleadings, depositions and affidavits demonstrate that, as a matter of law, the moving party is entitled to judgment. 735 ILCS 5/2-1005(c) (West 2010). The purpose of summary judgment is not to answer a question of fact but determine whether one exists. *Ballog v. City of Chicago*, 2012 IL App (1st) 112429, ¶ 18. In determining whether a genuine issue of material fact exists, the trial court must construe the record strictly against the movant and liberally in favor of the nonmoving party. *Harlin v. Sears Roebuck & Co.*, 369 Ill. App. 3d 27 (2006). Summary judgment should not be granted unless the judgment in favor of the movant is clear and free from doubt. *Ballog*, 2012 IL App (1st) 112429, ¶ 18. We review a summary judgment order *de novo*. *Richard W. McCarthy Trust v. Illinois Casualty Co.*, 408 Ill. App. 3d 526 (2011).

¶ 14 ANALYSIS

¶ 15 Smith argues that the trial court erred in granting summary judgment because on the day of the accident the dangerous condition of the hopper was not "open and obvious" as a matter of law.

¶ 16 In a negligence action, the plaintiff must first prove that the defendant owed a duty to the plaintiff. *Kleiber v. Freeport Farm and Fleet, Inc.*, 406 Ill. App. 3d 249 (2010). Generally, an employer owes a duty to furnish employees a safe work place. *Clark v. Rural Electric Convenience Cooperative Co.*, 110 Ill. App. 3d 259 (1982) (applying duty to farmers); Restatement (Second) of Agency § 492 (1957).

¶ 17 The duties of an employer with respect to the working conditions of the premises are

substantially the same as those of a possessor of land to an invitee. *Genaust v. Illinois Power Co.*, 62 Ill. 2d 456 (1976); see also Restatement (Second) of Agency (1957), Non-Delegable Duties of Master, Introductory Note. A possessor of land owes an invitee a legal duty if injury from a defective condition on the property is reasonably foreseeable. *Kleibert*, 406 Ill. App. 3d at 255; Restatement (Second) of Torts § 343 (1965). However, the likelihood and foreseeability of an injury are considered slight, negating a duty to protect, when the condition is open and obvious. *Bucheleres v. Chicago Park District*, 171 Ill. 2d 435 (1996).

¶ 18 An open and obvious condition negates a defendant's duty because it is assumed that those who encounter the danger will appreciate and avoid the risks associated with it. *Id*. at 456. A condition presents an open and obvious danger where the risk is apparent to and can be appreciated by "a reasonable [person], in the [plaintiff's position] exercising ordinary perception, intelligence, and judgment." *Deibert v. Bauer Brothers Construction Co.*, 141 Ill. 2d 430 (1990). Evidence that the dangerous condition was obscured or that the plaintiff did not notice it presents a question of fact as to whether the condition was open and obvious. See *Duffy v. Togher*, 382 Ill. App. 3d 1 (2008) (question of fact presented where plaintiff testified that pool created an "optical illusion" of a deep end)*; Buchaklian v. Lake County Family YMCA*, 314 Ill. App. 3d 195 (2000) (question of fact existed where testimony indicated that plaintiff did not notice raised edge of mat because it was the same color as the floor); *American National Bank & Trust Co. of Chicago v. National Advertising Co.*, 149 Ill. 2d 14 (1992) (testimony by plaintiff's coworker that he did not see the power line created a question of fact as to whether danger was open and obvious). Summary judgment is not

proper where reasonable minds could differ as to whether a condition poses an open and obvious danger. *Simmons v. American Drug Stores, Inc.*, 329 Ill. App. 3d 38, 43 (2002).

¶ 19 Here, Smith testified that he retrieved the Westfield auger from the Timmons farm three or four days before the accident and that Myre Farming had four Westfield augers nearly identical to the Timmons auger. Further, he stated that although he had seen the 8 inch by 10 inch hole in the guard when he picked the auger up, he did not notice the hole when he moved the auger into position on the day of the accident. According to Smith's testimony, he could not see the guard when he was unloading the truck because the hopper was full of beans. Mark Wilbur, Smith's coworker, also stated that the guard was not visible on the day of the accident. Wilbur testified that he did not know there was a hole in the guard until he reached his hand into the hopper to free Smith's leg. Their testimony establishes that the defect in the guard was not so open and obvious at the time of the injury that, as a matter of law, it should relieve defendants of liability. Based on this record, whether the hole in the guard was an open and obvious danger is for the jury to determine. In light of our decision, we need not consider the remaining arguments on appeal.[1]

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[1] As an alternative basis for affirming the trial court, defendants argue that implied primary assumption of the risk applies and negates any duty owed to Smith. The use of an inherently dangerous piece of equipment does not necessarily require the trial court to apply the doctrine of primary assumption of the risk. In this case, Smith alleged that the risk of harm, being injured by the hole in the guard, was created by defendants' negligence in failing to provide a safe work place and failing to inspect the auger. Thus, implied secondary assumption of the risk applies, and plaintiff's decision to step over the hopper could serve only, at most, as a

¶ 20 CONCLUSION

¶ 21 The judgment of the circuit court of La Salle County granting summary judgment in favor of defendants is reversed, and the cause is remanded for further proceedings.

¶ 22 Reversed and remanded.

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measure of damages. See *Duffy v. Midlothian Country Club*, 135 Ill. App. 3d 429, 433-35.