2013 IL App (5th) 110557-U

NO. 5-11-0557

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

RAYMOND W. HUBERT,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Randolph County.
	)	
v.	)	No. 10-L-11
	)	
RANDOLPH COUNTY FAIR, INC.,	)	Honorable
	)	Richard A. Brown,
Defendant-Appellee.	)	Judge, presiding.

PRESIDING JUSTICE SPOMER delivered the judgment of the court.
Justices Goldenhersh and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court incorrectly granted summary judgment for the defendant where condition in question was not open and obvious to the plaintiff. Order reversed; cause remanded.

¶ 2 The plaintiff, Raymond W. Hubert, appeals the order of the circuit court of Randolph County that granted the motion for summary judgment filed by the defendant, Randolph County Fair, Inc. For the reasons that follow, we reverse and remand for further proceedings not inconsistent with this order.

¶ 3 FACTS

¶ 4 The facts necessary to our disposition of this appeal are as follows. On May 7, 2010, the plaintiff filed a two-count complaint, sounding in negligence (count I) and in premises liability (count II), in which he alleged, *inter alia*, that the defendant was at all relevant times an Illinois not-for-profit corporation responsible for hosting a public "mud bog" racing event at the Sparta Fairgrounds on July 16, 2009, and that the plaintiff, who was "helping" the

defendant and was "lawfully invited to be on the fairgrounds," was injured while detaching a cable from a tractor "when the cable was pulled up behind his legs." On August 9, 2011, the defendant filed a motion for summary judgment, and a memorandum of law in support thereof, in which the defendant contended it owed no duty of care to the plaintiff because: (1) the plaintiff "assumed the risk of harm involved with pulling trucks out of the mud bog pit," and (2) "the dangerous condition of the cable was open and obvious." The facts cited in the supporting memorandum were derived entirely from the deposition testimony of the plaintiff. The trial judge entered an order on November 10, 2011, in which he found the dangerous condition of the cable to be open and obvious, and in which he granted summary judgment as to premises liability but denied it as to negligence. The judge noted, however, that he rejected "the argument that there is not a genuine issue of fact as to whether or not a master servant [*sic*] relationship existed between the parties." The defendant then filed, on December 5, 2011, a motion to reconsider or, in the alternative, clarify, the ruling. The plaintiff, in turn, filed a timely notice of appeal. On February 7, 2012, the trial judge entered a second order, in which he granted summary judgment on both counts of the complaint, finding no duty of care on the part of the defendant because the condition which caused the plaintiff's injury "was open and obvious to him." He did not discuss the existence or nonexistence of a master-servant relationship. The plaintiff filed a second timely notice of appeal, which this court construed, in an order dated March 2, 2012, to either be in lieu of, or to amend, the prior notice of appeal. Additional facts will be provided as necessary throughout the remainder of this order.

¶ 5 ANALYSIS

¶ 6 Because the plaintiff appeals from an order granting summary judgment in favor of the defendant, our standard of review is *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). A summary judgment should only be granted

when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. *Id.* Only when the movant's right to judgment is clear and free from doubt is a summary judgment appropriate, as it is a drastic measure. *Id.* Where reasonable persons could draw different inferences from undisputed facts, a summary judgment is improper. *Id.* With these well-established standards in mind, we turn to the order on appeal.

¶ 7 As explained above, the trial judge granted summary judgment on the basis that the defendant owed no duty of care to the plaintiff because the condition which caused the plaintiff's injury was open and obvious. We begin by noting that if the defendant owed no duty of care to the plaintiff, "there will be no liability, because a legal duty is a prerequisite to liability" under Illinois tort law. *Belluomini v. Stratford Green Condominium Ass'n*, 346 Ill. App. 3d 687, 691 (2004). To determine if a duty of care exists, Illinois courts consider such relevant factors as the likelihood of injury, the reasonable forseeability of injury, the magnitude of the burden of guarding against injury, and the consequences of placing that burden on a particular defendant. *Id*. Under what is known as the open-and-obvious doctrine, however, one who possesses land is not liable to his or her invitees " 'for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.' " *Deibert v. Bauer Brothers Construction Co.*, 141 Ill. 2d 430, 435 (1990) (quoting Restatement (Second) of Torts § 343(A)(1), at 218 (1965)). " 'Known' means 'not only knowledge of the existence of the condition or activity itself, but also appreciation of the danger it involves.' " *Id*. (quoting Restatement (Second) of Torts § 343(A) cmt. b, at 219 (1965)). " 'Obvious' denotes that 'both the condition and the risk are apparent to and would be recognized by a reasonable [person], in the position of the visitor, exercising ordinary perception, intelligence, and judgment.' " *Id*. (quoting Restatement (Second) of Torts §

343(A) cmt. b, at 219 (1965)). The considerations expressed in sections 343 and 343(A), quoted above, should be taken into account when deciding whether an injury was "reasonably foreseeable." *Id*. at 438.

¶ 8 Applying these principles of law to the case at bar, we cannot agree with the trial court that the condition which harmed the plaintiff was open and obvious. In his deposition, the plaintiff testified that one of the duties assigned to him as a volunteer on the night he was injured was to hook a cable to a tractor that was used to pull trucks that had become stuck in the mud bog pit out of it, and to unhook the cable once the tractor had finished pulling a truck out of the pit and had stopped moving. He testified that a concurrent duty was to "keep people out of the line" of the cable, which was approximately 150 feet long, "so nobody would trip over it." The plaintiff testified that people walking near the cable did not realize how dangerous the cable could be, and if they were not warned, they would try to jump over it, not realizing that when the cable became taut it could "maybe come a foot off the ground." He had performed these duties at the fair for at least the previous "two or three" years. At the time of the accident that injured him, the tractor was pulling a truck out of the mud bog pit, and the plaintiff was "trying to tell people, you know, stay out of the path of this cable." The plaintiff testified that he was walking toward the tractor when "for some reason somebody said something," the plaintiff turned to look "in the opposite direction to see who was hollering," and then was hit by the cable "from behind the leg." He testified that he was knocked off his feet. He did not see the cable hit him or know exactly what caused it to hit him, but he was later told that once the truck that was being pulled out of the pit got to the "starting point," the driver of the truck "instead of letting us pull him all the way out, put it in reverse and backed up on his own to help get out of there, and when he did, he backed on top of the cable," causing it to tighten up and hit the plaintiff. The plaintiff could not recall who told him this, and the secondhand account of the accident relayed by the plaintiff is

neither corroborated nor contradicted by any other document or testimony in the record on appeal.

¶ 9 The defendant contends the testimony of the plaintiff that he knew the cable was dangerous and that he was actively warning others about its danger proves that the condition that injured the plaintiff–"a moving cable that poses a tripping hazard to persons in its path," as the defendant characterizes the condition–was open and obvious. The plaintiff, on the other hand, posits that although he was aware that the cable constituted a tripping hazard when moving–and although he was warning other invitees to that effect–he was not aware of the risk that the driver of a truck that was being pulled from the pit would place the truck in reverse, back the truck up, and possibly run over the cable, thereby constricting it and injuring someone near it. We agree with the plaintiff that although the evidence as developed at this point in the proceedings demonstrates that the plaintiff had actual knowledge of the tripping danger posed by the cable, neither the evidence nor the relevant case law supports a finding as a matter of law that the condition which actually injured the plaintiff–the unexpected constriction of the cable when it was backed over by a truck being pulled out of the mud bog pit–was open and obvious. First, we cannot say, as a matter of law, that such a condition and the danger that it posed was obvious, because we cannot conclude that it was " 'apparent to and would be recognized by a reasonable [person], in the position of the visitor, exercising ordinary perception, intelligence, and judgment.' " *Deibert v. Bauer Brothers Construction Co.*, 141 Ill. 2d 430, 435 (1990) (quoting Restatement (Second) of Torts § 343(A) cmt. b, at 219 (1965)). Second, we cannot say, as a matter of law, that it was known, because we cannot conclude that in this case there was " 'not only knowledge of the existence of the condition or activity itself, but also appreciation of the danger it involves.' " *Id.* (quoting Restatement (Second) of Torts § 343(A) cmt. b, at 219 (1965)). To the contrary, we conclude that neither the plaintiff nor any other invitee acting reasonably would have

appreciated the danger of a truck backing over the cable and thereby constricting it. Accordingly, as a matter of law, the condition was not open and obvious to the plaintiff, and we reverse the trial court's grant of summary judgment to the defendant on the basis that it was.

¶ 10 The second basis upon which the defendant sought summary judgment in the trial court was that the plaintiff "assumed the risk of harm involved with pulling trucks out of the mud bog pit" and that accordingly the defendant owed no duty of care to the plaintiff. As the defendant correctly notes, although assumption of risk did not form the basis of the trial court's grant of summary judgment, this court can affirm the trial court on any basis in the record, and could, accordingly, affirm the trial court's order on the basis of assumption of risk. See, *e.g.*, *Evans v. Lima Lima Flight Team, Inc.*, 373 Ill. App. 3d 407, 418 (2007). Both parties agree that for the assumption-of-risk doctrine to apply to this case, a master-servant relationship would have to exist between the parties. The defendant posits that the plaintiff's deposition testimony proves the existence of such a relationship. However, we agree with the plaintiff that in the case at bar, on the basis of the evidence properly before it, the trial court could not have found, as a matter of law, that a master-servant relationship existed between the parties. The existence of such a relationship is generally a question of fact (see, *e.g.*, *Alms v. Baum*, 343 Ill. App. 3d 67, 72 (2003)), and in the case at bar, there are multiple unanswered factual questions regarding such issues as, *inter alia*, the right to discharge the plaintiff, the manner of directing the plaintiff, the right of the defendant to terminate its relationship with the plaintiff, and the character of the defendant's supervision of the plaintiff. Accordingly, we decline the defendant's invitation to affirm, on the basis of assumption of risk, the trial court's order granting summary judgment.

¶ 11 CONCLUSION

¶ 12 For the foregoing reasons, we reverse the trial court's order granting summary

judgment to the defendant and remand for further proceedings not inconsistent with this order.

¶ 13 Reversed; cause remanded.