STATE OF MICHIGAN

COURT OF APPEALS

IBRAHIM FARAH,

Plaintiff,

v

STELLAR BUILDING & DEVELOPMENT,

Defendant/Third-Party Plaintiff/
Appellant,

v

EXCAVATING ASSOCIATES, INC., and
SKYLINE CONCRETE FLOOR CORPORATION,

Third-Party Defendants/
Appellees.

UNPUBLISHED
May 9, 1997

No. 187653
Wayne Circuit Court
LC No. 93-335446

IBRAHIM FARAH,

Plaintiff-Appellant,

v

STELLAR BUILDING & DEVELOPMENT,

Defendant/Third-Party Plaintiff/
Appellee,

v

EXCAVATING ASSOCIATES, INC., and
SKYLINE CONCRETE FLOOR CORPORATION,

No. 187755
Wayne Circuit Court
LC No. 93-335446

Third-Party Defendants.

Before: Taylor, P.J., and Gribbs and R. D. Gotham*, JJ.

PER CURIAM.

In Docket No. 187755, plaintiff Ibrahim Farah appeals as of right from an order granting defendant Stellar Building & Development (Stellar) summary disposition pursuant to MCR 2.116(C)(10) in this premises liability action. In Docket No. 187653, Stellar appeals as of right from an order granting summary disposition to third-party defendants Skyline Concrete Floor Corporation (Skyline) and Excavating Associates, Inc. (Excavating) pursuant to MCR 2.116(C)(10). This Court previously issued an order consolidating the appeals. We affirm in Docket No. 187755 and dismiss the appeal in Docket No. 187653 as moot in light of our holding in Docket No. 187755.

Docket No. 187755

On June 5, 1992, plaintiff was working as a soil testing engineer at a construction site. An employee of Stellar (the general contractor) asked plaintiff to test some soil that had been extracted from a large trench to determine if it was safe for Excavating to begin digging. Because there was no walkway across the open trench, plaintiff climbed down into the trench so that he could get to the other side where the soil sample was located. Plaintiff crossed over the trench via concrete footings and checked the sample. While starting back across the trench plaintiff's foot slipped on the wet concrete. Plaintiff sustained injuries as a result of falling and subsequently filed a lawsuit against Stellar. Stellar was granted summary disposition on the basis that plaintiff's claim was barred by the open and obvious danger doctrine.

Plaintiff contends that summary disposition should not have been granted under MCR 2.116(C)(10) because an issue of fact remained regarding whether the danger posed by the wet concrete on which he fell was open and obvious. Plaintiff argues that, even if the danger was open and obvious, an issue of fact remained regarding whether Stellar owed him a duty because the risk of harm was unreasonable.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. In reviewing a grant of summary disposition, we must independently determine, giving the benefit of doubt to the nonmovant, whether the movant would have been entitled to judgment as a matter of law. The courts are liberal in finding a genuine issue of material fact. *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992). Before it grants summary disposition, the trial court must be satisfied that it is impossible for the claim or defense asserted to be supported by the development of a record that would leave open an issue upon which reasonable minds might differ. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995); *Dzierwa v Michigan Oil Co*, 152 Mich App 281, 284; 393 NW2d 610 (1986).

---

* Circuit judge, sitting on the Court of Appeals by assignment.

The elements that must be proven before a prima facie case of negligence is shown are: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached that duty; (3) that the defendant's breach of duty was a proximate cause of the plaintiff's damages; and (4) that the plaintiff suffered damages. *Jackson v Oliver*, 204 Mich App 122, 125; 514 NW2d 195 (1994). "Duty" is a legally recognized obligation to conform to a particular standard of conduct toward another." *Chivas v Koehler*, 182 Mich App 467, 475; 453 NW2d 264 (1990). The question of duty comprehends whether a defendant is under obligation to the plaintiff to avoid negligent conduct. *Buczkowski v McKay*, 441 Mich 96, 100; 490 NW2d 330 (1992); *Schuster v Sallay*, 181 Mich App 558, 562; 450 NW2d 81 (1989). Duty can arise from a statute or a contract or by application of the basic common law that imposes an obligation to use due care or to act so as not to unreasonably endanger the person or property of others. *Antoon v Community Emergency Medical Service, Inc*, 190 Mich App 592, 595; 476 NW2d 479 (1991); *Hetterle v Chido*, 155 Mich App 582, 587; 400 NW2d 324 (1986). Ordinarily, whether a duty exists is a question of law for the court. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). If no duty is found to exist, summary disposition is appropriate. *Eason v Coggins Memorial Methodist Episcopal Church*, 210 Mich App 261, 263; 532 NW2d 882 (1995).

Whether the open and obvious danger doctrine applies to bar plaintiff's claim is a question of law reviewed de novo by this Court. See *Riddle v McClouth Steel Products*, 440 Mich 85, 95; 485 NW2d 676 (1992).

> [W]here the dangers are known to the invitee or 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*. at 96.]

As a general rule, a business invitor owes a duty to its customers to maintain its premises in a reasonably safe condition and to exercise ordinary care to keep the premises reasonably safe. *Schuster, supra* at 565. The "open and obvious danger" rule is a defensive doctrine that attacks the duty element of a negligence claim. *Riddle, supra* at 95. The doctrine is based on the standard outlined in 2 Restatement Torts, 2d, § 343A(1), which provides:

> A possessor of land is not liable to his 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.* [*Riddle, supra* at 94 (emphasis supplied).]

Therefore, a business invitor owes no duty to warn or protect customers from dangers that are so obvious that invitees should be reasonably expected to discover them on their own. *Id.* Whether a danger is open and obvious depends whether it is reasonable to expect an average user with ordinary intelligence to discover the danger upon casual inspection. *Eason, supra* at 264.

Summary disposition was properly granted. The danger here was obvious to plaintiff and, as plaintiff conceded, he could have gone around the trench to reach the sample. Indeed, plaintiff knew the

concrete was wet and he was injured only after successfully crossing the point of danger and returning to it on his way back across the trench. This falls clearly within the doctrine set forward in *Riddle, supra*. Summary disposition was proper because the danger was open and obvious and the risk of harm was not unreasonable.

Docket No. 187653

Stellar filed a third-party complaint against Skyline and Excavating seeking indemnification or contribution in the event that Stellar was found responsible for plaintiff's injuries. Because we have determined that Stellar cannot be found responsible for plaintiff's injuries, this appeal is moot.

In Docket No. 187755, we affirm. Stellar, being the prevailing party, may tax costs pursuant to MCR 7.219. In Docket No. 187653, we dismiss the appeal as moot and no costs are awarded.

/s/ Clifford W. Taylor
/s/ Roy D. Gotham

I concur in result only.

/s/ Roman S. Gribbs