STATE OF MICHIGAN

COURT OF APPEALS

DENTON SORENSON and SANDRA SORENSON, Plaintiffs-Appellants,	UNPUBLISHED April 27, 1999
v	No. 208302 Genesee Circuit Court
MCLAREN REGIONAL MEDICAL CENTER, Defendant-Appellee.	LC No. 96-047800 NO

Before: Neff, P.J., and Kelly and Hood, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the circuit court order granting summary disposition pursuant to MCR 2.116(C)(8) and (10) in favor of defendant in this premises liability action. We affirm.

I

Plaintiffs first challenge the trial court's determination that defendant did not have a duty to warn of the rise in the sidewalk near the hospital emergency entrance because the allegedly hazardous condition was open and obvious. Plaintiffs contend that the court misapplied the open and obvious doctrine and disregarded their testimony as well as that of other witnesses that established that the condition was not obvious to plaintiff and others. We disagree.

Initially, we note that although defendant's motion for summary disposition was premised on both MCR 2.116(C)(8) and (10), the trial court did not specify the ground for its grant of the motion. However, because both parties relied on matters outside the pleadings in their arguments in opposition to and in support of this claim, as did the trial court in making its ruling, we review this issue pursuant to MCR 2.116(C)(10).

On appeal, a trial court's ruling on a motion for summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Id.*

In order to establish a prima facie case of negligence, a plaintiff must prove the following four elements: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation; and (4) damages. *Swan v Wedgwood Christian Youth & Family Services, Inc*, 230 Mich App 190, 195; 583 NW2d 719 (1998). The dispute in this matter focuses primarily on whether defendant had a duty to warn plaintiff of the alleged dangerous condition on its property from which plaintiff sustained his injuries.

In premises liability cases, the existence and scope of a property owner's duty depends on the extent of the owner's possession and control over the property. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 660; 575 NW2d 745 (1998). Moreover, the specific duty owed by a land owner to those who enter onto the property depends on the status of the visitor - trespasser, licensee or invitee - at the time of the injury. *Stanley v Town Square Cooperative*, 203 Mich App 143, 146-147; 512 NW2d 51 (1993).

The parties assumed below, for purposes of the motion, that plaintiff was a business invitee on defendant's premises.[1] In Michigan, it is well settled that a property owner owes a duty to invitees to maintain its premises in a reasonably safe condition and to exercise ordinary care to protect invitees from conditions that might result in injury. *Riddle v McLouth Steel Products, 440 Mich 85, 90; 485 NW2d 876 (1992).* In addition, premises owners must warn invitees of hidden or latent defects on their land; however, there is no duty to warn of open and obvious dangers unless the property owner should anticipate the harm despite the invitee's knowledge of the condition. *Id*. at 94. A danger is considered open and obvious if it may reasonably be expected that an average user with ordinary intelligence would discover the danger upon casual inspection. *Eason v Coggins Memorial Methodist Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995).

In *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995), the Michigan Supreme Court adopted the Second Restatement's description of a land owner's duty toward invitees and the scope of that duty. The Court summarized the rule generated from the applicable Restatement sections and their accompanying comments, as follows:

> When §§ 343 and 343A are read together, the rule generated is that if the particular activity or condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger. On the other hand, if the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor is required to undertake reasonable precautions. The issue then becomes the standard of care and is for the jury to decide. [*Id.*, emphasis in original, footnote omitted]

We conclude, as did the trial court, that the rise or slope in the sidewalk leading to the entrance of the hospital was an open and obvious condition in the area that plaintiff should have been aware of, and for which no warning was necessary or required of defendant. In other words, we are convinced that the alleged hazardous condition was open and obvious to an average user with ordinary intelligence upon casual inspection of the premises. *Eason, supra* at 264. Moreover, we find that the garbage can

located near the entrance of the hospital was discernible to all pedestrians, and did not create an unreasonable risk of harm to plaintiff and others. Plaintiff admitted that he observed the garbage can and acknowledged that he must walk around it in order to enter the hospital. He likewise conceded that he noticed the rise in the sidewalk as he approached the trash can, and that the walkway sloped as he walked down the hill. Accordingly, we find that the condition was open and obvious and did not impose a duty to warn on defendant.

Nevertheless, the inquiry into defendant's liability does not end there. As the Supreme Court noted in *Bertrand, supra* at 610-614, even where the hazardous condition is open and obvious, a land owner may still be liable if the circumstances surrounding the condition create an unusual or unreasonable danger, despite the obviousness and knowledge of the invitee, that would require the property owner to take additional precautionary measures to avoid harm.

In this case, we are not persuaded that the sidewalk in question, or the existence or placement of the garbage can, created a unique situation or an unreasonable risk of harm for those traveling on the walkway. The area was designated as an emergency entrance into a hospital which certainly justifies the sloped driveway or access ramp to allow medical personnel to efficiently carry gurneys and equipment to and from the hospital. Moreover, the trash can was conveniently located outside the entrance so that visitors may dispose of their trash before entering the hospital. Furthermore, both the trash can and the rise in the sidewalk were visible to the public and were obvious conditions on the walkway to plaintiff and others. We find nothing unusual or unreasonable about the location of these conditions or the circumstances surrounding their existence that would give rise to a duty to warn on behalf of defendant or a duty to take precautionary measures to avoid anticipated harm. Accordingly, we hold that summary disposition in favor of defendant was proper.

II

Plaintiffs next argue that even if the slope on the walkway was open and obvious, thereby discharging any duty on behalf of defendant to warn of the condition, this fact does not exonerate defendant of total liability, but rather, only of its duty to warn. Plaintiffs insist that defendant still had a duty to maintain and repair the premises to keep it safe, and its failure to do so was negligent conduct that defeated summary disposition.

Plaintiffs' claim was based on both the failure to warn theory and the failure to maintain the premises in a safe condition theory. In order to defeat the motion for summary disposition, plaintiffs were required to submit documentary evidence in support of their claims that would create a genuine issue of material fact as to either of these theories. MCR 2.116(C)(10). As noted above, we conclude that the trial court properly determined that viewing the evidence in the light most favorable to plaintiffs, the alleged hazardous condition was open and obvious, and the condition was not an unusual or unique circumstance that created an unreasonable risk of harm for plaintiff or others. In other words, reasonable minds could not differ on the issue of obviousness *or* reasonableness; hence, there was no duty to warn.

Moreover, for purposes of the failure to maintain theory of liability, in the absence of documentary evidence demonstrating that there was an unreasonably dangerous condition that defendant failed to maintain in a safe manner, no duty was imposed on defendant. Accordingly, plaintiffs failed to meet their burden of proof as it relates to both theories of liability, and summary disposition in favor of defendant was proper.

Affirmed.

/s/ Janet T. Neff
/s/ Harold Hood

[1] In defendant's brief on appeal, it submits that plaintiff was actually a licensee on the hospital premises because he was not there for business purposes, or as a patient; rather, plaintiff was visiting his ill mother. However, because defendant acknowledges that both parties argued below that plaintiff was an invitee, and because the law governing summary disposition motions requires that the court accept all well-pleaded allegations in the complaint as true, we will assume for the purpose of our analysis that plaintiff's status at the time he was injured was that of an invitee.