STATE OF MICHIGAN

COURT OF APPEALS

RODNEY KORBINSKI,

Plaintiff-Appellant,

v

JAMES CSUTORAS, TANYA CSUTORAS and ELBOW LAKE BAR, INC.,

Defendants-Appellees.

UNPUBLISHED
April 30, 1999

No. 207719
Clare Circuit Court
LC No. 96-900092 NI

Before: Fitzgerald, P.J., and Doctoroff and White, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right from an order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10).[1] We affirm.

Plaintiff filed a complaint alleging that defendants, who own and operate a restaurant and bar catering to snowmobilers, maintained unreasonably dangerous conditions on their land, particularly an unmarked and unlighted lake access point and a wooden box protruding out from the bar near the lake access. On appeal, plaintiff argues that the trial court erred in granting summary disposition of his complaint on the basis of the open and obvious danger doctrine. We disagree.

This Court reviews de novo an order granting summary disposition. *Michigan Mutual Insurance Co v Dowell,* 204 Mich App 81, 86; 514 NW2d 185 (1994). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Id.* at 85. The motion may be granted when, except with regard to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* The court must consider the documentary evidence submitted by the parties and, giving the benefit of reasonable doubt to the nonmoving party, must determine whether a record might be developed that would leave open an issue upon which reasonable minds could differ. *Id.* The party opposing the motion may not rest on mere allegations or denials in the pleadings, but must, by affidavit or other documentary evidence, set forth specific facts demonstrating a genuine issue for trial. *Ball v Chrysler Corp,* 225 Mich App 284, 286; 570 NW2d 481 (1997).

The parties disagree with respect to whether plaintiff was an invitee or a licensee at the time of his accident. Whether plaintiff was an invitee or a licensee has direct bearing on the duties defendants owed to him. *D'Ambrosio v McCready*, 225 Mich App 90, 96; 570 NW2d 797 (1997). A licensee is owed only a duty of warning of, or of making safe, hidden dangers about which the owner knows or has reason to know. *Id*. at 94. With respect to invitees, a landowner has a duty to exercise reasonable care to protect the invitees from an unreasonable risk of harm caused by a dangerous condition that the owner knows or should know the invitees will not discover or protect themselves against. *Hughes v PMG Building, Inc,* 227 Mich App 1, 9; 574 NW2d 691 (1997). In the instant case, because we conclude that the alleged dangerous conditions were open and obvious, it need not be determined whether plaintiff was an invitee or a licensee at the time of his accident.

Generally, a possessor of land owes no duty to licensees or invitees regarding open and obvious dangers. *Riddle v McLouth Steel Products Corp,* 440 Mich 85, 95-96; 485 NW2d 676 (1992); *Hughes, supra* at 10; *White v Badalamenti,* 200 Mich App 434, 437; 505 NW2d 8 (1993). The test of openness and obviousness is whether an average user with ordinary intelligence would have been able to discover the danger and the risk presented on casual inspection. *Novotney v Burger King Corp (On Remand),* 198 Mich App 470, 474-475; 499 NW2d 379 (1993). Because the test of openness and obviousness is an objective one, the question is not whether plaintiff himself saw the shoreline or the wooden box, but whether an average user, on casual inspection, would have discovered the danger. *Id*. at 475; *Bertrand v Alan Ford, Inc*, 449 Mich 606, 612; 537 NW2d 185 (1995). 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 danger doctrine will cut off liability if the invitee should have discovered the condition and realized its danger. *Bertrand, supra* at 611. 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. *Id*.

The question therefore is whether the shoreline and the wooden box were open and obvious dangers. We conclude that any dangers posed by the shoreline or the wooden box could have been observed on casual inspection. The area was indirectly illuminated by a light pole next to the bar entrance and a light pole on the south side deck. Furthermore, any danger caused by inadequate lighting at the lake access point or near the wooden box was itself open and obvious. See *Knight v Gulf & Western Properties, Inc,* 196 Mich App 119, 127; 492 NW2d 761 (1992). In addition, plaintiff had been in the area many times. Having concluded that any danger was open and obvious, we also conclude that any risk of harm did not remain unreasonable despite the openness and obviousness of the conditions. *Bertrand, supra* at 611. Plaintiff stated that he did not see the shoreline prior to hitting it because the "lake came short" and the shoreline "came before I realized it." In the instant case, the dangers of the incline of the shoreline and the wooden structure were avoidable and obvious to an average user upon casual inspection. Further, the conditions cannot be deemed unreasonably dangerous because the conditions created a risk of harm only because plaintiff did not discover them. *Id.* Thus, because no genuine issue of material fact existed with respect to whether the alleged dangerous conditions were open and obvious, we

conclude that the trial court correctly granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(10).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Martin M. Doctoroff
/s/ Helene N. White

[1] Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). The order granting summary disposition does not indicate under which subrule of MCR 2.116 the trial court granted the motion. However, because the trial court referred to facts beyond the pleadings to decide the motion, we will presume that the trial court granted summary disposition pursuant to MCR 2.116(C)(10). *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703, 705; 532 NW2d 186 (1995).