STATE OF MICHIGAN

COURT OF APPEALS

JAMES KIRIAZIS,

Plaintiff-Appellant,

v

JEFFERSON BEACH MARINA, INC.,

Defendant-Appellee.

UNPUBLISHED
November 2, 1999

No. 204948
Macomb Circuit Court
LC No. 96-003197 NO

Before: O'Connell, P.J. and Talbot and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10) in this premises liability action. We reverse and remand for further proceedings.

This case stems from an accident in which plaintiff injured his finger while at defendant's marina. While en route to his boat stored in one of defendant's barns, plaintiff tripped on a wooden pallet that contained a stack of steel I-beams, and one of the unsecured I-beams fell from the stack and injured his finger. The trial court granted defendant's motion for summary disposition because it concluded that the danger was open and obvious.

We review the trial court's decision whether to grant the motion for summary disposition de novo to determine whether any genuine issue of material fact exists that would prevent entering judgment for the moving party as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). In making this determination, we view the documentary evidence in a light favoring the nonmoving party. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993).

The parties do not dispute that plaintiff was an invitee on defendant's premises.[1] An invitor owes a duty "'to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land' that the [invitor] knows or should know the invitees will not discover, realize, or protect themselves against." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995), quoting *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988). See also 2 Restatement Torts 2d, §343, pp 215-216. However, an invitor

generally has no duty to warn or protect an invitee of open and obvious dangers. *Bertrand*, *supra* at 610-611; *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96 485 NW2d 676 (1992); *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 495-497; 595 NW2d 152 (1999). The parties also do not dispute that the danger presented by the pallet was open and obvious.[2]

The open-and-obvious-danger doctrine generally relieves the invitor of the duty to warn or protect the invitee of open and obvious dangers; however, the invitor still owes a duty to protect the invitee from conditions that pose an unreasonable risk of harm despite their open and obvious nature.[3] *Bertrand*, *supra* at 610-611; *Riddle*, *supra* at 96; *Millikin*, *supra* at 498; *Hughes v PMG Building, Inc*, 227 Mich App 1, 10; 574 NW2d 691 (1997). Michigan courts have approvingly cited the following rule from the Second Restatement of Torts:

> 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. [2 Restatement Torts 2d, § 343A(1), p 218.]

This rule has sometimes been stated in terms of whether the risk remains unreasonable despite its open and obvious nature. *Bertrand*, *supra* at 611 ("[I]f 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."); *Millikin*, *supra* at 498 (holding that summary disposition for the defendant was appropriate where the plaintiff failed to present facts that the dangerous condition posed an unreasonable risk despite its open and obvious nature). Other times, the rule has been stated in terms of whether the harm was foreseeable despite the open and obvious nature of the condition. *Bertrand*, *supra* at 610-611 ("While there may be no obligation to warn of a fully obvious condition, the possessor still may have a duty to protect an invitee against foreseeably dangerous conditions."); *Riddle*, *supra* at 96 ("However, where 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."); *Hughes*, *supra* at 10 ("[E]ven if a danger is open and obvious, a possessor of land may still have a duty to protect invitees against foreseeably dangerous conditions."). We conclude that both characterizations of the rule are accurate—a risk that remains unreasonable despite its open and obvious nature is one where harm will foreseeably occur despite that open and obvious nature.[4]

In this case, the evidence indicated that the pallet of I-beams was located in an especially cluttered area, which was also the only direct route to the doorway of the barn where plaintiff's boat was stored. Both plaintiff and his companion testified that it was difficult to negotiate through the narrow zigzag path to the doorway, and that the pallet of I-beams was located in front of the door, leaving a space of less than two feet between the pallet and the doorway.[5] Plaintiff could not easily avoid the danger because he had to negotiate a narrow path around the pallet in order to access his boat. It would be reasonable to conclude that defendant should have anticipated that an invitee would bump into the pallet while attempting to enter the barn. Moreover, the I-beams on the pallet were not secured in any manner. Plaintiff could have taken reasonable steps to prevent the I-beams from falling from the pallet, such as tying them down. It was foreseeable that, despite the open and obvious nature of the

danger, an invitee might bump into the pallet, causing an I-beam to fall and cause injury. Viewing this evidence in favor of plaintiff, a genuine issue of material fact exists regarding whether the risk remained unreasonable despite its open and obvious nature. Had the risk consisted only of the mere presence of the pallet, we would be less inclined to find a genuine issue of fact; however, the presence of the pallet coupled with the fact that the I-beams were unsecured leads us to conclude that a jury question exists in this case. Therefore, the trial court erred in granting summary disposition in favor of defendant. Because plaintiff has successfully raised a genuine issue of material fact, the factfinder must resolve this issue and determine whether the risk was unreasonable. *Bertrand*, *supra* at 611, 617. If it concludes that the risk was unreasonable, then defendant's duty to exercise reasonable care to protect invitees extended to this risk. *Id*. at 617. The factfinder must then determine whether defendant breached this duty and whether this breach proximately caused plaintiff's injury.[6]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Michael J. Talbot
/s/ Brian K. Zahra

[1] An invitee is person who is invited to enter or remain on the premises either for a purpose for which the premises are held open to the public or for a purpose connected with the business of the possessor of the premises. *Stitt v Holland Abundant Life Fellowship*, 229 Mich App 504, 506-508; 582 NW2d 849 (1998), citing 2 Restatement Torts, 2d, § 332, p 176.

[2] A danger is open and obvious where "it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection." *Hughes v PMG Building, Inc*, 227 Mich App 1, 10; 574 NW2d 691 (1997).

[3] Plaintiff argues that the open-and-obvious-danger doctrine is only applicable to cases claiming a breach of the duty to warn. However, this Court has recently held that the doctrine applies in all premises liability actions, regardless of the pleaded theory of liability. *Millikin*, *supra* at 497.

[4] We note that our Supreme Court recently split evenly on the proper characterization of this rule. In *Singerman v Municipal Service Bureau, Inc*, 455 Mich 135; 565 NW2d 383 (1997), Justices Weaver, Boyle, and Riley held that the question is not the foreseeability of the harm, but rather, whether the risk of harm remains unreasonable despite its open and obvious nature. *Id*. at 142-143. However, Justices Mallett, Brickley, and Cavanagh maintained that the invitor "may still be liable to invitees if he should anticipate that the hazard will cause injury." *Id*. at 146. Justice Kelly did not participate in the decision.

[5] Additionally, plaintiff presented the affidavit of a safety expert, who stated that the pallet of I-beams presented an unreasonable risk of harm because the I-beams were unsecured and could shift by anyone brushing up against them and because the pallet was located approximately two feet from a door that defendant knew people needed to enter in order to access the storage area.

[6] To recover for negligence, plaintiff must prove that defendant breached a duty owed to plaintiff and that this breach was a proximate cause of the damages suffered by plaintiff. *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993).