STATE OF MICHIGAN

COURT OF APPEALS

TERRENCE P. VAN DAM and STACEY M. VAN DAM, Plaintiffs-Appellants, v ELWIN E. SPINK, CLARE JORDON, and MARK SEARS, Defendants-Appellees.	UNPUBLISHED January 2, 2001 No. 220711 Jackson Circuit Court LC No. 97-081226-NO

Before: Sawyer, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Plaintiffs appeal as of right from two orders of the Jackson Circuit Court granting defendants' motions for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

This case arises out of an injury that plaintiff Terrence Van Dam (plaintiff) suffered while working on a farm machine, a forage wagon that is used to haul and blow silage into a silo. To accomplish this function, the wagon has two chain conveyor belts that unload the silage by pulling it forward where the silage is "grabbed" by a lower set of tines and moved up to two upper sets of tines where it is eventually blown out of the wagon into the silo. The sets of tines are commonly known as beater bars.

Two days before plaintiff's accident, one of the chain conveyors broke. At the time the conveyor broke, plaintiff was watching defendant Sears pitch silage into the wagon. Plaintiff observed Sears get into the wagon and unload silage from the broken side of the wagon to the operating side of the wagon. The chain conveyor was subsequently repaired.

However, on the day of plaintiff's accident, and while plaintiff was using the wagon by himself, the conveyor chain again broke. Like Sears did two days earlier, plaintiff climbed into the wagon and attempted to move the silage.

Approximately five minutes later, the tines "grabbed" plaintiff and carried him over the top of the other two rotating bars. Plaintiff was severely injured and, therefore, filed suit against

defendants in circuit court. Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10) asserting that defendants owed no duty to protect or warn plaintiff of the wagon's dangerous condition because the danger that the wagon posed was open and obvious and/or defendants had no special relationship with plaintiff. The circuit court agreed and granted defendants summary disposition pursuant to MCR 2.116(C)(10).

We review de novo a trial court's grant of summary disposition based on MCR 2.116(C)(10). *Clark v United Technologies Automotive, Inc*, 459 Mich 681, 686; 594 NW2d 447 (1999). A motion for summary disposition pursuant to MCR 2.116(C)(10) will be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. This Court must consider the pleadings, affidavits, and other documentary evidence in the same manner as the trial court and in a light most favorable to the nonmoving party. *Clark, supra*, 459 Mich 686; see also MCR 2.116(G)(5).

On appeal, plaintiffs first argue that Jordon had a duty to keep his premises in a reasonably safe condition for plaintiff's use as well as to warn plaintiff of the wagon's dangerous condition and Jordon breached these duties.

As a general rule, an invitor owes his invitees a duty to maintain his premises in a reasonably safe condition and to exercise ordinary care to keep the premises safe. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 193; 600 NW2d 129 (1999). However, an invitor's duty to protect or to warn plaintiff of potential dangers does not extend to open and obvious conditions unless the condition, by its character, location, or surrounding conditions, is such that a reasonably prudent person would not expect to see it. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614-615; 537 NW2d 185 (1995); *Riddle v McLouth Steel Products*, 440 Mich 85, 90-95; 485 NW2d 676 (1992); *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490; 595 NW2d 152 (1999). Whether a danger is open and obvious depends upon whether it is reasonable to expect an average user with ordinary intelligence to discover the danger upon casual inspection. *Weakley v Dearborn Hts*, 240 Mich App 382, 385; 612 NW2d 428 (2000). Whether a duty exists is a question of law for the court to decide. *Johnson v Turner Construction*, 198 Mich App 478, 480; 499 NW2d 27 (1993).

The wagon at issue, with its rapidly moving beater bars and chain conveyors, clearly presented an open and obvious danger. Additionally, the wagon's condition was not unreasonably dangerous because the wagon's character, location, or surrounding conditions were not such that a reasonably prudent person would not expect to see the dangerous condition. Instead, not only would a reasonably prudent person expect to see the wagon's dangerous condition, the evidence established that plaintiff did in fact see the dangerous condition and knew that he could be injured if he came into contact with the beater bars. Thus, Jordon's duty to protect or warn plaintiff of the wagon's dangerous condition was eliminated because the wagon's dangerous condition was open and obvious.

Second, plaintiffs argue that defendant Spink had a duty to warn plaintiff of the wagon's dangerous condition. As a general rule, there is no duty which obligates one person to aid or protect another unless there is a special relationship between the plaintiff and the defendant.

Dykema v Gus Macker Enterprises, Inc, 196 Mich App 6, 8; 492 NW2d 472 (1992). In a special relationship, "one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself." *Id*. Commonly recognized special relationships include "common carrier-passenger, innkeeper-guest, employer-employee, landlord-tenant, and invitor-invitee." *Id*.

Although plaintiffs asserted that Spink supplied plaintiff with "defective, unsafe, and improper tools," plaintiff was not under Spink's control or protection. The forage wagon was loaned to defendant Jordon by Spink. Plaintiff was not Spink's employee or obligated to use Spink's machine. Plaintiff was simply on Jordon's property helping Jordon with various farm tasks.

Moreover, plaintiff had no consequent loss of control to protect himself. As stated above, the evidence established that plaintiff saw the wagon's dangerous condition and understood that if he came into contact with the beater bars they would cause him personal injury. At this point, plaintiff could have easily stopped using the wagon or asked Spink or Jordon how to unload the rest of the silage in a safe manner. Because plaintiff failed to establish a special relationship between himself and Spink, Spink had no duty to warn plaintiff of the wagon's dangerous condition.

Last, plaintiffs argue that Sears had a duty to protect plaintiff from harm because plaintiff was a business invitee of Sears' employer Jordon and because a special relationship existed between plaintiff and Sears; and Sears breached his duty to protect plaintiff. Additionally, plaintiffs argue that Jordon is vicariously liable for Sears' negligent conduct.

Sears did not have a duty to protect plaintiff from harm based on the fact that plaintiff was a business invitee of Sears' employer Jordon. Michigan case law clearly states that it is the possessor and one in control of the land who has the duty to maintain his premises in a reasonably safe condition and to exercise ordinary care to keep the premises safe. *Orel v Uni-Rak Sales Co, Inc*, 454 Mich 564, 568; 563 NW2d 241 (1997). In this case, Sears was not in possession or control of the premises where plaintiff was injured. Instead, the record is clear that it was Jordon who was in possession and control of the farm where plaintiff was injured. Sears was merely Jordon's employee hired to help bring in Jordon's crop for the year.

Additionally, plaintiff did not entrust himself to the control and protection of Sears with a consequent loss of control to protect himself. The record clearly established that plaintiff simply observed Sears unload the silage from the broken side of the wagon to the operating side of the wagon—Sears never gave plaintiff instructions on how to unload the wagon when it was broken. Additionally, Sears was Jordon's employee and did not have authority to prescribe plaintiff's tasks.

Moreover, plaintiff had no consequent loss of control to protect himself. Plaintiff testified that he did in fact see the dangerous condition and understood that if he came into contact with the beater bars, such contact would cause him personal injury.

Because Sears owed no duty to plaintiff and thus could not have been negligent, we need not review plaintiffs' claims of gross negligence and vicarious liability.

Affirmed.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Hilda R. Gage