STATE OF MICHIGAN

COURT OF APPEALS

RICHARD A. McGILLIS,

Plaintiff-Appellant/Cross-Appellee,

v

PIER 49, INC.,

Defendant-Third-Party Plaintiff-Appellee,

and

VENTURE MARINE SERVICE, INC., RICHARD E. DAVIS, d/b/a DAVIS MARINE SURVEY, and HARBOR NINE STORAGE,

Defendants-Appellees,

and

LEONARD MAISNER,

Defendant/Third-Party Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
April 20, 2001

No. 214786
Macomb Circuit Court
LC No. 97-002231-NI

Before: Collins, P.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

Plaintiff appeals as of right, and defendant Leonard Maisner cross-appeals, from the

circuit court's orders granting summary disposition to defendants pursuant to MCR 2.116(C)(10)[1] in this premises liability action. We affirm.

Plaintiff was injured when he fell into an open hatch in the floor of the cabin of a boat he had just purchased from defendant Maisner. Plaintiff filed a complaint against several defendants, including Maisner, Pier 49 (the broker that arranged the sale), Venture Marina (the company plaintiff hired to winterize the boat), and Richard Davis (the person plaintiff hired to survey the boat before sale), alleging that one or more of them was negligent in leaving the cover off the hatch, failing to make the premises safe, or failing to warn him of the danger of the open hole. Plaintiff later added a claim against Maisner for breach of express and implied warranties of fitness for intended use. The circuit court granted defendants summary disposition on the basis that none of the defendants had ownership, possession, or control of the boat and, in any event, the danger presented by the uncovered hatch was open and obvious.

Plaintiff first argues that the circuit court erred in granting defendants summary disposition because at the time of the accident, at least one of the defendants had possession and control of the boat and thus owed plaintiff a duty, the danger posed by the open hatch was not open and obvious, and even if the danger was open and obvious, there was a genuine issue of fact regarding whether the risk of harm was unreasonable. This Court reviews decisions on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual basis underlying the plaintiff's claim. *Maiden v Rozwood,* 461 Mich 109, 120; 597 NW2d 817 (1999). We review the pleadings, affidavits, depositions, and any other documentary evidence in a light most favorable to the nonmoving party. *Id.* "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id.*

A possessor of property has a duty to protect invitees[2] from possible injury by exercising due care and maintaining the property in a reasonably safe condition. *Riddle v McClouth Steel Products Corp,* 440 Mich 85, 90; 485 NW2d 676 (1992). However, no duty is owed where the dangers are known or are open and obvious, unless the risk of injury remains unreasonable despite the open and obvious nature of the danger. *Bertrand v Alan Ford, Inc,* 449 Mich 606, 611; 537 NW2d 185 (1995). In other words,

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[1] While the circuit court did not expressly state the ground on which it was granting summary disposition, the record indicates that summary disposition was granted on the basis that there existed no genuine issue of fact for trial. Further, because the record shows that the parties and the lower court relied on matters outside the pleadings, the motion was properly considered by the circuit court, and will be reviewed by this Court, under MCR 2.116(C)(10). *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997).

[2] A possessor's duty depends upon the status of the visitor. *Hottmann v Hottmann,* 226 Mich App 171, 175; 572 NW2d 259 (1997). While the parties disagree with regard to who owned or was in possession and control of the boat at the time of the accident, their arguments correctly presume that if plaintiff was not the owner or possessor of the boat at the time of the accident, his status was that of invitee.

> 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. [*Riddle, supra* at 96.]

Whether a danger is open and obvious depends on whether it is reasonable to expect an average user with ordinary intelligence to discover the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

Assuming without deciding that one of the defendants in this case had possession and control over the boat at the time of the accident, none of them owed plaintiff a duty, because the danger presented by the uncovered hatch was open and obvious. The photograph submitted by plaintiff with his affidavit shows that the uncovered hatch, which was approximately twenty inches by thirty inches, was clearly visible and would be apparent to an average user with ordinary intelligence upon casual inspection. Although plaintiff contends that his vision was affected by the change in light between the outside and the inside of the cabin, he testified that there was enough light in the cabin when he entered that he was not afraid he would trip over something, and he acknowledged that when he entered the cabin, he did not look down at the floor. Because the uncovered hatch was open and obvious, defendants did not owe plaintiff a duty to warn or make safe.

Whether a danger presents an unreasonable risk of harm, notwithstanding its open and obvious nature, is determined by considering the "'character, location, [and] surrounding conditions'" of the danger. *Bertrand, supra* at 616-617, quoting *Garrett v WS Butterfield Theatres, Inc*, 261 Mich 262, 263-264; 246 NW2d 57 (1933); *Spagnuolo v Rudds #2, Inc*, 221 Mich App 358, 360-361; 561 NW2d 500 (1997). In order for the risk of injury to be an unreasonable one, a plaintiff must show that there is something unusual about the dangerous premises. *Bertrand, supra* at 617; *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 499; 595 NW2d 152 (1999).

Plaintiff presented no evidence that a hatch opening in the cabin of a large boat is unusual or that there was anything unusual about this particular hatch opening; rather, plaintiff contends that he did not expect that there would be a hole in the middle of the cabin floor because the hatch had been covered during his earlier visits. However, because plaintiff's risk of falling would have been eliminated had he observed the opening, see *Abke v Vandenberg*, 239 Mich App 359, 363; 608 NW2d 73 (2000), citing *Hottmann v Hottmann*, 226 Mich App 171, 176; 572 NW2d 259 (1997), we conclude that there is no genuine issue of fact with regard to whether the open hatch presented an unreasonable risk of harm. Accordingly, the circuit court did not err in granting defendants summary disposition.

Defendant next argues that if this Court concludes that the circuit court's grant of summary disposition with regard to his premises liability claim was appropriate, his claim that Maisner breached the implied warranty of fitness that accompanies the sale of a product is valid and presents a material issue for trial. Plaintiff provides only cursory treatment of this issue in its brief, and does not explain how the only authority cited, *McGhee v General Motors Corp Truck and Coach Div*, 98 Mich App 495; 296 NW2d 286 (1980), supports his position, which is inadequate to merit review. See *Frericks v Highland Twp*, 228 Mich App 575, 600; 228 NW2d

575 (1998). In any event, as Maisner argues in his cross-appeal, there is no evidence that Maisner is a boat merchant, MCL 440.2314; MSA 19.2314, or that plaintiff relied on Maisner's "skill or judgment to select or furnish suitable goods," MCL 440.2315; MSA 19.2315. Further, the contract for sale of the boat expressly excludes all implied warranties of merchantability and fitness for a particular purpose. MCL 440.2316(2); MSA 19.2316(2); see also *Kueppers v Chrysler Corp,* 108 Mich App 192, 209-210; 310 NW2d 327 (1981). Accordingly, plaintiff's alternative argument is without merit.

Finally plaintiff argues that the circuit court abused its discretion by not granting him leave to amend his complaint to allege an agency relationship between plaintiff and defendant Pier 49. Plaintiff contends that such an amendment would be justified because, as his agent, Pier 49 owed a duty to plaintiff to warn him of dangerous conditions such as the open hatch. However, even assuming that as plaintiff's agent, Pier 49 would owe him a duty to warn of dangers on the boat, plaintiff has alleged no facts that would support a finding, under Michigan law, that Pier 49 was acting as his agent with regard to the sale of the boat. Because amendment to allege an agency relationship between Pier 49 and plaintiff would be futile, the circuit court did not abuse its discretion in denying plaintiff's request to amend his complaint. MCR 2.116(I)(5); *Doyle v Hutzel Hosp,* 241 Mich App 206, 211-212; 615 NW2d 759 (2000).

Affirmed.

/s/ Jeffrey G. Collins
/s/ Kathleen Jansen
/s/ William C. Whitbeck