STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM HOLMES,

Plaintiff-Appellant,

V

SHOPCO GROUP, INC, a Michigan Corporation, a/k/a EASTLAND CENTER,

Defendant-Appellee.

UNPUBLISHED
December 13, 2002

No. 232404
Wayne Circuit Court
LC No. 00-000441-NO

Before: Gage, P.J., and Cavanagh and Wilder, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's January 12, 2001 order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) in this premises liability action. We affirm.

I. Facts

On the evening of January 26, 1999, plaintiff went to the Home Depot store located near the intersection of Eight Mile Road and Kelly Road in Harper Woods to buy a vinyl runner for his apartment. When he left the store, he walked toward the Target store parking lot adjacent to Eastland Mall so he could get to the bus stop on the opposite side of the mall. After crossing the road between the Home Depot and Target lots, plaintiff encountered a long snow bank, "at least two feet" high, in the Target lot. Plaintiff testified that he had to walk over the snow bank because it was approximately a quarter of a mile long. Defendant's maintenance staff had created this "wind row" of snow and several other such rows by plowing the snow in the lanes of the parking lot.

Plaintiff testified that he stepped up onto the snow bank with one foot and, as he stepped down with the other into a puddle of water at the base of the snow bank, his foot slipped to the side on ice in the water and he fell forward. As a result of his fall, plaintiff injured his right knee.

Plaintiff filed this action claiming that defendant had breached its duty to him as an invitee to maintain its property in reasonably safe condition and warn of snowy and icy conditions in the parking lot. Plaintiff also alleged that defendant failed to properly hire and supervise its employees.

Defendant filed a motion for summary disposition, contending that there was no genuine issue of material fact that the condition of the snow bank where plaintiff fell was open and obvious and not unreasonably dangerous and that accordingly, defendant did not owe a duty to plaintiff. Plaintiff opposed the motion, arguing that the water and ice at the base of the snow bank rather than the snow bank itself caused plaintiff to fall and that defendant had not acted reasonably to diminish the hazard presented by the snow and ice. Plaintiff also argued that there was no other practical way for plaintiff to get to the bus stop. After hearing oral arguments, the trial court granted defendant's motion. The trial court concluded that the condition of the snow bank was open and obvious and that the snow bank did not create an unreasonable risk of harm. The trial court found that it was irrelevant whether plaintiff fell while crossing the snow bank or as he stepped down from it, since plaintiff could have taken other available routes to get to his bus stop that did not involve climbing over the snow bank. This appeal ensued.

II. Standard of Review

We review de novo a trial court's decision to grant a motion for summary disposition. *Veenstra v Washtenaw Country Club,* 466 Mich 155, 159; 645 NW2d 643 (2002).

III. Analysis

The trial court did not err in granting summary disposition. A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the plaintiff's claim. *Id.* at 163. The moving party has the initial burden of showing that no genuine issues of material fact exist, and the opposing party must produce substantively admissible evidence demonstrating that there are factual issues in order to avoid summary disposition. *Id.* The court reviews the affidavits, pleadings, depositions, admissions, and other admissible evidence that the parties submit in a light most favorable to the non-moving party. *Id.* at 164. If the evidence shows that no genuine factual issues remain, the moving party is entitled to judgment as a matter of law. *Id.*

The parties in this case do not dispute plaintiff's status as an invitee on defendant's land. The essence of the question in this case is what duty, if any, did defendant owe plaintiff. Whether a duty exists is a question of law for the court. *MacDonald v PKT, Inc*, 233 Mich App 395, 400; 593 NW2d 176 (1999), rev'd on other grounds 464 Mich 322 (2001). If the determination of a duty requires fact finding, this role must be filled by the jury. *Id.*

> "In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo* [*v Ameritech Corp, Inc,* 464 Mich 512, 516; 629 NW2d 384 (2001)], citing *Bertrand* [*v Alan Ford, Inc,* 449 Mich 606, 609; 537 NW2d 185 (1995)]. However, "this duty does not generally encompass removal of open and obvious dangers." *Lugo, supra* at 516. Open and obvious dangers exist "where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them . . . ." *Riddle* [*v McLouth Steel Products Corp,* 440 Mich 85, 96; 485 NW2d 676 (1992)]. Regarding open and obvious dangers, "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." *Id.* As our Supreme Court clarified in *Lugo*, "the open and obvious doctrine should not be viewed as some type of 'exception' to the duty

generally owed invitees, but rather as an integral part of the definition of that duty. *Lugo, supra* at 516.

> The test to determine if a danger is open and obvious is whether "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). Because the test is objective, this Court "look[s] not to whether plaintiff should have known that the [condition] was hazardous, but to whether a reasonable person in his position would foresee the danger." *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997).

Plaintiff admits that the trial court correctly decided that the snow bank was open and obvious. Plaintiff contends on appeal, however, that he was no longer navigating the snow bank when he fell, but instead that he fell on the pavement of the parking lot when he stepped into the puddle of water. Plaintiff argues that the trial court erred by finding these facts irrelevant to the determination whether the hazard to plaintiff was open and obvious. We disagree.

Plaintiff's deposition testimony, available to the trial court when it granted summary disposition in favor of defendant, is different from that asserted by plaintiff on appeal. Plaintiff testified that he still stepped on the snow bank with one foot and stepped down with his other foot when he slipped and fell in the ice and water at the base of the snow bank. Plaintiff did not testify that he had already stepped off of the snow bank and onto the parking lot pavement before he slipped and fell. Thus, we find no error in the trial court's conclusion that defendant fell because he tried to go over a snow bank that presented open and obvious risks. Clearly, "an average user with ordinary intelligence [would] have been able to discover" the risk that ice and snow would present at the bottom of a snow bank. *Novotney, supra* at 470.

We also find no error in the trial court's conclusion that the risk presented was not unreasonably dangerous. "'[I]f special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk.'" *Joyce, supra* at 240, quoting *Lugo, supra* at 517. Whether the risk of harm is unreasonable must be evaluated without regard to the injury suffered by the plaintiff. *Lugo, supra* at 518 n 2.

The evidence establishes that plaintiff had several routes available to him that did not involve climbing the snow bank. Thus, there are no "special aspects" of the open and obvious hazard that would render the condition "effectively unavoidable" and therefore, unreasonably dangerous. *Joyce, supra* at 242.

Affirmed.

/s/ Hildra R. Gage
/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder