

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT JACKSON, JR.,

Plaintiff-Appellant,

v

LONE STAR STEAKHOUSE & SALOON OF
MI, INC.,

Defendant-Appellee.

UNPUBLISHED
December 8, 2005

No. 256332
Saginaw Circuit Court
LC No. 02-046078-NO

Before: Smolenski, P.J., and Schutte and Borrello, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand.

Plaintiff was injured in a slip and fall that occurred after leaving defendant's restaurant. Plaintiff had parked his vehicle at the end of defendant's parking lot and parallel to a curb. While opening his car door, plaintiff stepped back over the curb and into a depression, which plaintiff claimed was concealed by snow. Plaintiff further alleged that the unexpected depression caused him to lose his balance, fall and break his ankle. The trial court granted summary disposition in favor of defendant on the ground that the danger was open and obvious. On appeal, plaintiff argues that the trial court erred when it determined that the hazard in question was open and obvious. We agree.

This Court reviews de novo the grant or denial of a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Id.* Summary disposition is appropriate under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." When determining whether there is a genuine issue as to any material fact, the trial court must consider the evidence presented by the parties in the light most favorable to the party opposing the motion. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999), quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v*

Gen Motors Corp, 469 Mich 177, 183; 665 NW2d 468 (2003), citing *Shallal v Catholic Social Services of Wayne Co*, 455 Mich 604, 609; 566 NW2d 571 (1997); *Quinto, supra* at 369.

In cases of premises liability, there is a general duty on the part of the party in possession of the premises to take reasonable steps to protect invitees from an unreasonable risk of harm caused by dangerous conditions present on the premises. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). “However, this duty does not generally encompass removal of open and obvious dangers.” *Id.* A dangerous condition is open and obvious if it is “‘readily apparent or easily discoverable upon casual inspection by the average user of ordinary intelligence.’” *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 473; 499 NW2d 379 (1993), quoting *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 394; 491 NW2d 208 (1992). Because there is admissible evidence from which a jury could conclude that an average user of ordinary intelligence would not have been able to discover the hazard in question upon a casual inspection of the area, the grant of summary disposition in favor of defendant on the basis of the open and obvious doctrine was inappropriate.¹

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

/s/ Michael R. Smolenski

/s/ Stephen L. Borrello

¹ We respectfully disagree with the dissent’s conclusion that, because the snow itself is open and obvious, plaintiff was on notice that there might be additional hazards concealed by the snow. “[T]he open and obvious doctrine will cut off liability if the invitee should have discovered the condition *and realized the danger.*” *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995) (emphasis added). While the open and obvious character of the snow might reasonably put a pedestrian on notice of a potential slip hazard, it does not, by itself, place an average pedestrian of ordinary intelligence on notice that the snow conceals a significant depression.