STATE OF MICHIGAN

COURT OF APPEALS

DOUGLAS HOLLIDAY,

Plaintiff-Appellant,

v

MODERN NEON SIGNS CO., and DK-JW BARRY PROPERTIES, INC.,

Defendant-Appellees.

UNPUBLISHED
February 20, 2007

No. 268300
Kalamazoo Circuit Court
LC No. 04-000022-NO

Before: Sawyer, P.J., and Neff and White, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right the circuit court's order granting summary disposition in favor of defendants under MCR 2.116(C)(10). We affirm.

On February 4, 2003, plaintiff Douglas Holliday, a delivery truck driver, was injured when he fell in a parking lot owned by defendant DK-JW Barry Properties, Inc., and leased by defendant Modern Neon Signs Company. Although it snowed on the day plaintiff fell, he testified that he did not slip and fall. Rather, he presumed that he fell on a drain in the parking lot, which was located almost directly under the driver's side door of his delivery van. Plaintiff initiated an action against defendants, alleging that he "fell at the site of a depressed and deteriorated sewer/manhole located in the parking lot that was improperly maintained and was further obscured due to snow and/or ice covering said hazardous condition." The circuit court granted summary disposition in favor of defendants under MCR 2.116(C)(10) on the basis that the condition was open and obvious.

Plaintiff first argues that the circuit court erred in granting summary disposition in favor of defendants because the drain was covered in snow and, therefore, was not open and obvious. We disagree.

We review de novo a trial court's ruling on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When reviewing a motion for summary disposition under MCR 2.116(C)(10), we must consider the pleadings, depositions, admissions and other documentary evidence in the light most favorable to the nonmoving party. *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 41-42; 672 NW2d 884 (2003). If the evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Franchino v Franchino*, 263 Mich App 172, 181; 687 NW2d 620 (2004). Further,

questions of law, including whether defendants owed a duty to plaintiff, are reviewed de novo by this Court. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004).

In a premises liability action, a plaintiff must prove the following elements of negligence: (1) that the defendant owed a duty to the plaintiff, (2) that the defendant breached the duty, (3) that the defendant's breach of the duty caused the plaintiff's injuries, and (4) that the plaintiff suffered damages. *Teufel v Watkins*, 267 Mich App 425, 427; 705 NW2d 164 (2005). Generally, 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). "[I]t is the duty of a possessor of land to take reasonable measures within a reasonable period after an accumulation of snow and ice to diminish the hazard of injury to an invitee." *Anderson v Wiegand*, 223 Mich App 549, 553-554; 567 NW2d 452 (1997). However, the possessor of land is not an absolute insurer of an invitee's safety. *Id.* A premises possessor is generally not required to protect an invitee from open and obvious dangers. *Lugo, supra* at 517.

> 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). [*Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002).]

Plaintiff argues that the drain was not open and obvious because it was covered by a layer of snow. However, plaintiff testified on deposition that he did not look at the drain after he fell. He did not know whether the drain was covered with snow or if he simply did not see the drain because his truck was parked over it or he did not observe it. Other deposition testimony submitted below included that of a representative of the company that plowed the parking lot, who testified that the snow was plowed off the lot and the lot was salted on the morning in question. Thus, plaintiff failed to establish a genuine issue of material fact regarding whether the drain was covered in snow when he fell.

Further, the drain, itself, posed an open and obvious danger. Our Supreme Court has held that potholes in parking lots are an "everyday occurrence" that "ordinarily should be observed by a reasonably prudent person." *Lugo, supra* at 520, 523. We conclude that drains in parking lots, like ordinary potholes, are to be expected and, therefore, constitute open and obvious dangers.

Plaintiff's argument that even if the danger was open and obvious, defendant had a duty to undertake reasonable precautions to protect him because the condition was unreasonably dangerous, fails as well. Only those special aspects, which "give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove" a condition from the open and obvious danger doctrine. *Lugo, supra* at 517-518. In *Lugo*, our Supreme Court provided two examples of open and obvious conditions that are unreasonably dangerous: a condition creating a risk of death or serious harm such as an unguarded thirty-foot pit in a parking lot, or a condition that is unavoidable such as where the only route to exit a commercial building is covered in standing water. *Lugo, supra* at 518. The danger presented by the drain in

this case is unlike either of these examples. The condition was not so unreasonably dangerous that it created a risk of death or severe injury. A fall on a drain or a sunken manhole in a parking lot does not present the kind of an unusual risk of death or serious bodily harm that a fall into a thirty-foot pit in a parking lot would present. There was nothing about the condition of the drain that presented a higher risk of death or serious bodily injury than a typical drain or manhole that one would encounter in a parking lot. Plaintiff's expert concluded that the drain was in a dangerous and defective condition at the time of the accident because there was a drop-off in excess of 1-1/2 to 3 inches between the pavement and the drain. Nevertheless, the drain was similar to "ordinary potholes in a parking lot," which do not give rise to special aspects under *Lugo, supra* at 520. Contrary to plaintiff's argument, his expert's affidavit was not sufficient to establish a genuine issue of material fact regarding whether the drain posed an unreasonably dangerous risk of death or serious injury.

Affirmed.

/s/ David H. Sawyer
/s/ Janet T. Neff
/s/ Helene N. White