STATE OF MICHIGAN

COURT OF APPEALS

GERALD T. ELLIS,

Plaintiff-Appellant,

v

STAMPEDE MANAGEMENT, INC., and HOWARD O'BRIEN,

Defendants-Appellees,

and

WENDY'S MANAGEMENT SERVICES, L.L.C., and WENDY'S OF MICHIGAN, INC.,

Defendants.

UNPUBLISHED
April 15, 2008

No. 277014
Oakland Circuit Court
LC No. 2006-074956-NF

Before: Murray, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right the order of dismissal resulting from the trial court's grant of defendants', Stampede Management, Inc., and Howard O'Brien, motion for summary disposition. We affirm.

I. Facts

Plaintiff's action arises from a trip and fall that occurred in the lobby of a fast-food restaurant. According to plaintiff, the lighting in the restaurant was adequate to allow him to negotiate the premises. Plaintiff also testified that the ceramic tile floor of the restaurant lobby was free from slippery substances, and denied that anything obstructed his view of the chain that caused him to trip and fall.

To ensure that the queue of customers waiting to place a food order was ergonomically efficient and orderly, the restaurant lobby was equipped with a serpentine divider. This equipment, which consisted of iron railings, resembled a fence, corral, or maze. The serpentine queue divider had two entrances. One entrance would have required plaintiff to follow the maze to reach the counter. The other entrance would have allowed plaintiff more immediate access to the counter. Plaintiff tripped and fell over a chain that had been draped over the entrance that

would have given him more immediate access to the counter. Plaintiff testified in his deposition as to the events leading up to his fall:

> Q. So, you were – when you were walking towards the counter to go to this person, I assume you were going to place your order, would that be fair to say?
>
> A. Yes.
>
> Q. So, when you were walking to the counter to place your order, what were you looking at?
>
> A. Well, I was looking at where I was walking.
>
> Q. Okay. And what was that specifically that you were looking at while you were walking.
>
> A. The floor and then I would look up to the counter.
>
> Q. And when you say you were looking up at the counter, did you look at the menu any additional time, other than you said you looked at the menu when you first came in.
>
> A. I did look at the menu when I first came in. I realized the menu was so far away, you know, it's a reflex. I looked at the menu, I looked what was up there and then I look at the counter, I see the young man sort of motioning me to come forward so I start to come forward and my eyes, I could have went on the menu. I probably went on the menu again, but realized that as I'm walking I'm trying to think of what I'm going to order, the selection I'm going to make at the time.
>
> Q. Okay. Was there anything that would have obstructed your view, anything preventing you from seeing this rope here, this chain here, what we've described as the chain?
>
> A. I don't believe so, no.

The trial court granted defendants' motion for summary disposition, holding that defendants had no duty to warn of any danger because the condition was open and obvious, and presented no special aspects as defined by case law. This appeal followed.

II. Analysis

Plaintiff argues that in granting defendants' motion, the trial court erred in concluding that the hazard at issue was open and obvious, and further erred by applying the open and obvious hazard doctrine to bar what plaintiff characterizes as an ordinary negligence claim. We disagree.

This Court reviews a trial court's ruling on a motion for summary disposition de novo. *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115; 715 NW2d 28 (2006). Pursuant to a motion brought under MCR 2.116(C)(10), this Court construes the pleadings, admissions and other evidence submitted by the parties in a light most favorable to the non-moving party. *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007). Because a "mere promise" to offer factual support for a party's position at trial is insufficient to overcome a motion brought under MCR 2.116(C)(10), this Court considers "the substantively admissible evidence actually proffered in opposition to the motion." *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). Summary disposition is properly granted under MCR 2.116(C)(10) where there is no genuine issue of material fact for trial, except for the amount of damages, and the moving party is entitled to judgment as a matter of law. *Zsigo v Hurley Med Ctr*, 475 Mich 215, 220; 716 NW2d 220 (2006).

To set forth a prima facie premises liability case, a plaintiff must establish facts supporting the following elements: "(1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Benton v Dart Properties*, 270 Mich App 437, 440; 715 NW2d 335 (2006). Further, "in the absence of a legal duty there is no actionable negligence." *Reed v Michigan Metro Girl Scout Council*, 201 Mich App 10, 14; 506 NW2d 231 (1993).

The duty owed by a premises possessor to a visitor to the property depends on whether the visitor had the status as an invitee, licensee, or trespasser. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). Where, as here, a visitor holds the status of invitee, or one who has entered the premises for the purpose of transacting business, the premises possessor has the duty to warn the invitee of known dangers. This duty "requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards." *Stitt*, *supra* at 607. The duty owed by a premises possessor to an invitee does not extend to removal of open and obvious hazards, or warning the invitee about such conditions. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 522; 629 NW2d 384 (2001). Our Supreme Court defined open and obvious hazards as "dangers [that are] known to the invitee and are so obvious that the invitee might reasonably be expected to discover them." *Lugo*, *supra* at 516. Rather than constituting an exception to the duty ordinarily owed by premises possessors to invitees, the open and obvious hazard doctrine is "an integral part of . . . that duty." *Id*.

When presented with the issue of whether a condition was open and obvious, a reviewing court considers the objective nature of the premises, and decides whether it would be "reasonable to expect an average user with ordinary intelligence to discover the danger upon casual inspection." *Eason v Coggins Memorial Christian Methodist Episcopal Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995). See, also, *Lugo*, *supra* at 523. If the court determines that the defect is not latent, but is instead open and obvious, then the court considers whether any special aspects of the condition render the hazard unreasonably dangerous. *Id*. "Only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Id*. at 519. Where special aspects make an open and obvious condition unreasonably dangerous, "the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Id*. at 517.

In this case, the parties submitted for the trial court's consideration photographs of the chain that blocked the entrance to the serpentine divider. At his deposition, plaintiff testified to what was evident in all of the photographs, specifically, the presence of a clearly visible chain draped across a passageway in a well-lit area. Plaintiff admitted that there was nothing interfering with his ability to see the chain, i.e., the lighting was good, there were no customers blocking his view, and no other physical impediments to his viewing the chain. Although plaintiff argues that because of the high customer volume of defendants' restaurant[1] there must have been other similar accidents, plaintiff failed to come forward with admissible evidence to support that bare allegation in response to defendants' motion for summary disposition. MCR 2.116(G)(4). Plaintiff failed to present evidence that would cause reasonable minds to differ regarding whether it would be "reasonable to expect an average user with ordinary intelligence to discover the danger upon casual inspection." *Eason, supra* at 264. Accordingly, the trial court correctly decided that the chain was open and obvious as a matter of law. *Lugo, supra* at 520, 521.[2]

Moreover, plaintiff failed to submit any evidence to demonstrate that a "special aspect" of the chain rendered it unreasonably dangerous. *Lugo, supra* at 523, 524. In *Lugo*, the plaintiff argued that she did not notice the hazard, a pothole, because a truck diverted the plaintiff's attention away from her path of travel. *Id*. at 514-515. Reasoning that there was nothing unusual about a truck being driven in a parking lot, the *Lugo* Court held that the plaintiff's distraction would not preclude the application of the open and obvious hazard doctrine. *Id*. at 522.

In the present case, there was nothing about either the chain itself or the cashier's act of beckoning plaintiff that imposed an "unreasonably high risk of severe harm." *Lugo, supra* at 518. The chain is not analogous to "an unguarded thirty foot deep pit in the middle of a parking lot" described by the *Lugo* Court as a hazard that would "present such a substantial risk of death or severe injury" that it would remain an unreasonably dangerous, albeit open and obvious, hazard. *Lugo, supra* at 518. *Id*.

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[1] At the time plaintiff was at the restaurant, however, there were no other individuals waiting in line.

[2] Plaintiff relies on *Pippin v Atallah*, 245 Mich App 136; 626 NW2d 911 (2001), for the proposition that the question of whether the chain was open and obvious was an issue properly decided by the jury. However, *Pippin* is not similar at all to this case, as it involved a thin, 65-foot length of chain that stretched across two light poles at an unusual angle in an outdoor parking lot. *Id*. at 143-144. The chain in *Pippin* was not placed at the parking lot entrance parallel to the sidewalk, and the chain did not demarcate any commonly recognizable area. *Id*. at 143. On the basis of this and other evidence, which included testimony from multiple witnesses and multiple incidents, this Court concluded that there was a question of fact for the jury to decide regarding whether the chain at issue was an open and obvious hazard. *Id*. at 143-144.

Pedestrian traffic control devices, such as the one at issue in this case, are "everyday occurrences" that "ordinarily should be observed by a reasonably prudent person." *Lugo, supra* at 523. Additionally, the condition at issue here was not "effectively unavoidable." Plaintiff could have easily avoided the chain by entering the serpentine pathway, which was unobstructed, in the normal fashion instead of through the barrier. Although plaintiff argues that he performed a "casual inspection" of the premises but was still injured when he tripped over the chain, the relevant inquiry focuses "on the objective nature of the condition of the premises at issue, not on the degree of care used by the plaintiff." *Lugo, supra* at 524. Because the chain was open and obvious, and because no special aspects of the chain rendered it unreasonably dangerous, the trial court did not err in granting defendants' motion for summary disposition.

Plaintiff also argues that the trial court erred when it applied the open and obvious hazard doctrine to bar his ordinary negligence claim. Again, we disagree.

Plaintiff is correct that the open and obvious hazard doctrine does not apply to ordinary negligence claims, *Laier v Kitchen*, 266 Mich App 482, 484; 702 NW2d 199 (2005), for "[t]he open and obvious doctrine is specifically applicable to a premises possessor." *Ghaffari v Turner Const Co*, 473 Mich 16, 23; 699 NW2d 687 (2005). An action sounds in premises liability where the injury results from a condition on the land, as opposed to activity that created the condition. *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001).

Plaintiff contends that defendants' cashier waived him forward, distracting him and causing him to trip over the chain. Specifically, plaintiff asserts that the cashier's act in distracting him constituted ordinary negligence independent of the premises liability context. Further, plaintiff argues that the cashier's failure to warn plaintiff of the presence of the chain constituted ordinary negligence as well.

With respect to plaintiff's argument that the cashier's distraction of plaintiff was a basis for an ordinary negligence claim, "mere distractions are not sufficient to prevent application of the open and obvious danger doctrine." *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 716; 737 NW2d 179 (2007). To the extent that plaintiff argues that the cashier's failure to warn him about the chain constituted ordinary negligence, this contention is wholly devoid of merit. Longstanding precedent is clear that there is no duty to warn of an open and obvious hazard in the premises liability context. See *Riddle v McLouth Steel Products*, 440 Mich 85, 95-96; 485 NW2d 676 (1992). As the case cited by plaintiff makes clear, where, as here, a claim involves the liability of the possessor of land to a business invitee, the claim sounds in premises liability. *Laier, supra* at 491. Because plaintiff contended that defendants, as possessors of the land, were liable to plaintiff, a business invitee or customer, and because the chain was an open and obvious hazard, the cashier, as the premises possessor's representative, had no duty to warn plaintiff about it. The scope of the duty owed by a premises possessor to a business invitee is precisely what the open and obvious hazard doctrine was formulated to delineate. Because plaintiff's position directly contradicts existing Michigan law, his argument fails.

Finally, at his deposition, plaintiff unequivocally testified that the chain, and only the chain, was the cause of the accident that resulted in his injury. Plaintiff is bound by his unequivocal deposition testimony. *Kaufman v Payton PC v Nikkila*, 200 Mich App 250, 256; 503 NW2d 728 (1993). Plaintiff may not contradict his testimony in the attempt to recast his

action as one sounding in ordinary negligence in order to avoid the application of the open and obvious hazard doctrine.

Affirmed.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ Mark J. Cavanagh