# STATE OF MICHIGAN

# COURT OF APPEALS

DENISE GRZESIAK and RONALD GRZESIAK,

Plaintiffs-Appellants,

v

FIRST BROADCASTING INVESTMENT PARTNERS, LLC, and BIG D BROADCASTING, LLC,

Defendants-Appellees.

UNPUBLISHED
May 29, 2008

No. 277996
Washtenaw Circuit Court
LC No. 06-000745-NO

Before: Davis, P.J., and Murray and Beckering, JJ.

PER CURIAM.

Plaintiffs[1] appeal as of right from the trial court's order granting defendants' motion for summary disposition in their negligence and premises liability action on the ground that the allegedly dangerous condition was open and obvious. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff went to defendants' radio station to pick up movie tickets that her husband had won in a contest. While approaching the front entrance of the building, plaintiff slipped on a "slippery substance" on the sidewalk and fell forward, lacerating her chin and injuring three teeth. Plaintiff had noticed whole, half, and smashed apples, which had fallen from a nearby tree, onto the sidewalk, and she had stepped around some whole apples before falling. Plaintiff testified that, although she could not recall whether she was looking down and she did not see what caused her fall, she assumed it was a rotten apple. Referring to photos that she took the day after the incident, plaintiff identified the area of her fall based on the presence of a bloodstain on the grass and residue on the sidewalk, which were visible in the pictures. Defendants' business manager testified that the sidewalk was "cluttered" with whole, half, and smashed apples at the time of plaintiff's fall; she further testified that on "maybe one" prior occasion, a delivery person had complained about apples on the sidewalk, but that the station did not employ a service to maintain the sidewalk.

[1] Because Ronald Grzesiak's claims are derivative, the singular term "plaintiff" refers herein to Denise Grzesiak only.

The trial court granted defendants' motion for summary disposition, holding that the apples on the sidewalk presented an open and obvious danger. The court declined to address defendants' additional arguments that causation and notice were not established.

This Court reviews de novo the grant or denial of a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004); *Tipton v William Beaumont Hosp*, 266 Mich App 27, 32; 697 NW2d 552 (2005). A motion under MCR 2.116(C)(10)[2] tests the factual support of a plaintiff's claim. *Lind v Battle Creek*, 470 Mich 230, 238; 681 NW2d 334 (2004). The trial court may grant summary disposition under MCR 2.116(C)(10) if, considering the substantively admissible evidence in a light most favorable to the nonmoving party, there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law. *Lind, supra* at 238; *Maiden v Rozwood*, 461 Mich 109, 119-121; 597 NW2d 817 (1999).

To establish a prima facie case of negligence, a plaintiff must prove (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Henry v Dow Chemical Co*, 473 Mich 63, 72; 701 NW2d 684 (2005); *Fultz v Union-Commerce Ass'n*, 470 Mich 460, 463; 683 NW2d 587 (2004). Whether a defendant breached a duty of care toward a plaintiff is a question of fact for the jury, but summary disposition is appropriate if the moving party can show either that an essential element of the plaintiff's claim is lacking or that the evidence is insufficient to establish an element of the claim. *Latham v Nat'l Car Rental Systems, Inc*, 239 Mich App 330, 340; 608 NW2d 66 (2000).

"The threshold question in a negligence action is whether the defendant owed a duty to the plaintiff. 'It is axiomatic that there can be no tort liability unless defendants owed a duty to plaintiff.'" *Fultz, supra* at 463, quoting *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 262; 571 NW2d 716 (1997). A landowner generally has a duty to exercise reasonable care to protect an invitee from unreasonable risks of harm caused by dangerous conditions on the land. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, landowners "are not absolute insurers of the safety of their invitees." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995). Thus, premises possessors are not required to protect invitees from "open and obvious dangers" unless "special aspects" exist that render an open and obvious danger effectively unavoidable or give rise to a uniquely high likelihood of harm, rendering the condition unreasonably dangerous. *Lugo, supra* at 516-519.

A danger is open and obvious if "'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.'" *Corey v Davenport College of Business* (*On Remand*), 251 Mich App 1, 5; 649 NW2d 392 (2002), quoting *Novotney v Burger King Corp* (*On Remand*), 198 Mich App 470, 475; 499 NW2d 379

[2] Although defendants sought summary disposition under both MCR 2.116(C)(8) and (C)(10), the trial court did not indicate on which subsection it was relying in granting the motion. Because documentary evidence was submitted and relied upon by the trial court, we assume that the motion was granted under (C)(10). See *Mino v Clio School Dist*, 255 Mich App 60, 63; 661 NW2d 586 (2003); *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

(1993). This test is objective; the question, therefore, is "'whether a reasonable person in [the plaintiff's] position would foresee the danger.'" *Corey, supra* at 5, quoting *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997); see also *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329-330; 683 NW2d 573 (2004); *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002). "[I]t is important for courts in deciding summary disposition motions by premises possessors in 'open and obvious' cases to focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff." *Lugo, supra* at 523-524.

The trial court properly granted summary disposition to defendants on the basis of the open and obvious doctrine. The testimony establishes that the sidewalk was virtually covered with apples in all conditions – whole, half, rotten, and smashed. Indeed, plaintiff testified that she was well aware of the apples on the sidewalk and that she had attempted to step around some of the apples that were in her path. Despite being aware of the danger, plaintiff could not remember looking down to see where she was stepping. A person of ordinary intelligence in plaintiff's position would have foreseen the danger that was posed by fallen apples on the sidewalk and would have attempted to avoid it. *Mann*, *supra* at 329-330; *Corey*, *supra* at 5.

Furthermore, the trial court properly rejected plaintiffs' assertion that, despite the open and obvious character of the apples on the sidewalk, "special aspects" existed that rendered the condition unreasonably dangerous. Plaintiffs failed to establish that the apples presented a reasonably foreseeable and high risk of severe harm or that a typical person slipping on the apples would suffer severe injury. *Lugo*, *supra* at 519-520. Moreover, there is no evidentiary support for plaintiffs' assertion that the danger was unavoidable. Two other entrances to the building existed, and plaintiff testified that she was aware of at least one of those entrances. Furthermore, plaintiff agreed that she could have avoided the danger by walking on the grass or by simply leaving the building and coming back at a different time.

Noting that the open and obvious doctrine is inapplicable to a claim based on ordinary negligence, *Hiner v Mojica*, 271 Mich App 604, 615-616; 722 NW2d 914 (2006), plaintiffs attempt to draw a distinction between their claims of ordinary negligence and of premises liability. Nevertheless, we need not examine whether a prima facie claim of negligence has been established, because it is apparent that defendants did not breach any duty owed toward plaintiffs. The open and obvious doctrine "attacks the duty element that a plaintiff must establish in a prima facie negligence case," *Bertrand*, *supra* at 612, and the doctrine applies to a premises liability case "whether the plaintiff has pleaded the claim as a failure to warn of a dangerous condition or as a breach of duty in allowing the dangerous condition to exist," *Laier v Kitchen*, 266 Mich App 482, 489-490; 702 NW2d 199 (2005), citing *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 497; 595 NW2d 152 (1999). Because plaintiffs' theory of liability arises out of injuries caused by an allegedly defective condition on defendants' land, their claims of negligence and premises liability are indistinguishable. Accordingly, the open and obvious doctrine bars plaintiffs' claims. See *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001); *Hiner*, *supra* at 615.

Affirmed.

/s/ Alton T. Davis
/s/ Christopher M. Murray
/s/ Jane M. Beckering