

STATE OF MICHIGAN
COURT OF APPEALS

ALPHONSE SCHAAF, Personal Representative
of the Estate of ROBERT JOSEPH SCHAAF,
Deceased,

UNPUBLISHED
August 6, 2009

Plaintiff-Appellant,

v

No. 282234
Van Buren Circuit Court
LC No. 05-053724-NO

PULLMAN INDUSTRIES, INC,

Defendant-Appellee,

and

WEST BEND MUTUAL INS CO,

Intervenor.

Before: Markey, P.J., and Fitzgerald and Gleicher, JJ.

PER CURIAM.

Plaintiff appeals by right a judgment of no cause of action entered following a jury trial in this premises liability case. Plaintiff's decedent¹ allegedly slipped and fell on defendant's premises when walking through water covering a metal grate. We affirm.

On appeal, plaintiff argues that there was ample evidence for a reasonable jury to find that the iron cover to the drain grate in the loading bay, on which he fell, was concealed by the mud and water covering the loading bay. He argues this hazard was effectively unavoidable, and therefore, the trial court committed error requiring reversal when it granted summary disposition, in part by ruling as a matter of law that no special aspects existed to impose a duty on defendant if the condition at issue was open and obvious.

We review de novo a trial court's decision to grant summary disposition. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). A motion under MCR 2.116(C)(10) tests the

¹ Robert J. Schaaf died from unrelated causes and his claim was tried on behalf of his estate.

factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In evaluating a motion for summary disposition under this subsection, we consider affidavits, pleadings, depositions, admissions and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Coblentz, supra* at 567-568. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); MCR 2.116(G)(4); *Coblentz, supra* at 568.

The tort of negligence is commonly recognized as having four elements: 1) a duty; 2) the breach of that duty; 3) proximate cause; and 4) damages. See *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). The “duty” element addresses “whether the defendant is under any obligation to the plaintiff to avoid negligent conduct.” *Moning v Alfono*, 400 Mich 425, 437; 254 NW2d 759 (1977). Duty is a question of law for the court to decide. *Id.* at 436-437.

Generally, a premises possessor owes a duty of care 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. This duty generally does not encompass a duty to protect an invitee from “open and obvious” dangers. However, if there are “special aspects” of a condition that make even an “open and obvious” danger “unreasonably dangerous,” the premises possessor maintains a duty to undertake reasonable precautions to protect invitees from such danger. To determine whether a condition is “open and obvious,” or whether there are “special aspects” that render even an “open and obvious” condition “unreasonably dangerous,” the fact-finder must utilize an objective standard, i.e., a reasonably prudent person standard. That is, in a premises liability action, the fact-finder must consider the “condition of the premises,” not the condition of the plaintiff. [*Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 328-329; 683 NW2d 573 (2004) (citations omitted).]

The test to determine if a danger is open and obvious is whether an average user of ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002). The trial court left this question to the trier of fact, but determined that if the condition was open and obvious, no special aspects existed to nonetheless impose a duty on defendant. In *Lugo v Ameritech Corp*, 464 Mich 512, 516-517; 629 NW2d 384 (2001), the Court discussed the concept of special aspects, which it defined as those aspects that differentiate the risk at issue from typical open and obvious risks so as to create an unreasonable risk of harm. “[O]nly 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 the condition from the open and obvious danger doctrine.” *Id.* at 519. Examples of conditions that would constitute special aspects are: (1) an unguarded thirty foot deep pit in the middle of a parking lot resulting in a fall of an extended distance, and (2) standing water at the only exit of a commercial building resulting in the condition’s being unavoidable because no alternative route exists. *Id.* at 518.

We conclude, upon viewing the evidence in a light most favorable to plaintiff, that there was no genuine issue of material fact as to whether there were special aspects to the condition because the condition was not unavoidable. Plaintiff walked from the cab of his truck along side the driver’s side of the truck to the back doors without incident. Plaintiff could have avoided the

standing water with its unknown contents by simply walking back around the driver's side of the truck the way he came. Instead, he chose a different route and walked through standing water. Plaintiff did not testify that the reason he walked into the standing water on the passenger's side of the truck was because there was no other alternative. Plaintiff did not offer any evidence that the condition was unavoidable. Plaintiff could have avoided having to walk into the muddy standing water, the contents of which were unknown. There was a reasonable alternative. Cf. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 593; 708 NW2d 749 (2005). We affirm the trial court's grant of partial summary disposition on the issue of special aspects of the condition where no genuine issue of material fact existed on the existence of special aspects.

Plaintiff also argues that the trial court should have used M Civ JI 66.03 rather than a special verdict form. "We review claims of instructional error de novo. In doing so, we examine the jury instructions as a whole to determine whether there is error requiring reversal." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). When a party requests, the trial court must give a Model Civil Jury Instruction (M Civ JI) if it applies and accurately states the law. MCR 2.516(D)(2). The determination regarding the applicability of a M Civ JI to a particular case rests within the trial court's broad discretion, *Johnson v Corbet*, 423 Mich 304, 326-327; 377 NW2d 713 (1985), while a determination based upon a legal issue is a question of law, which we review de novo, *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 694-695; 630 NW2d 356 (2001).

The trial court used the special verdict form instead of M Civ JI 66.03 because it believed that "the language of negligence" on M Civ JI 66.03 "kind of skims over what creates the duty here" and thus the special verdict form conformed with M Civ JI 66.03 "as it fits the facts of the case." At the core of premises liability law is the idea that "a premises possessor owes a duty of care 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. This duty generally does not encompass a duty to protect an invitee from 'open and obvious' dangers." *Mann, supra* at 328. The jury was instructed without objection pursuant to M Civ JI 19.03 that "[a] possessor has a duty to use ordinary care to protect an invitee from risks of harm from a condition on the possessor's place of business if the risk of harm is unreasonable and the possessor knows or in the exercise of ordinary care should know of the condition and should realize that it involves an unreasonable risk of harm to an invitee." Questions one and two of the challenged special verdict form related to whether defendant had a duty to plaintiff and question three related to whether the condition was open and obvious. Courts generally decide the issue of duty. *Moning, supra* at 436-437; see also *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 500; 418 NW2d 381 (1988). Nonetheless, "[i]f the proofs create a question of fact that the risk of harm was unreasonable, the existence of a duty as well as breach become questions for the jury." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617; 537 NW2d 185 (1995). The questions at issue are consistent with premises liability law and the jury instructions that were provided to the jury. Thus, although M Civ JI 66.03 is a verdict form which relates to negligence in general, the special verdict form the trial court provided is tailored to premises liability law and the facts and issues of this case, and a court can refuse to give a generally applicable instruction based on the facts of a particular case. *Sells v Monroe Co*, 158 Mich App 637, 649; 405 NW2d 387 (1987); see also *Johnson, supra* at 326-327. The trial court did not abuse its discretion by using the special verdict form.

In addition, plaintiff argues that the word “condition” found in the verdict form should have been defined for the jury. Upon review of this unpreserved issue, we find no plain error with respect to the failure to define the term “condition.” See *Mina v General Star Indemnity Co*, 218 Mich App 678, 680-681; 555 NW2d 1 (1996), rev’d in part on other grounds 455 Mich 866 (1997). Because plaintiff argued that he slipped and fell on a metal drain grate, and defendant argued at trial that plaintiff slipped and fell in a puddle of water in the first loading dock area where a Pullman employee found him, there was a genuine issue of material fact as to what the “condition” was. Defining the “condition” for the jury on the verdict form would not have been appropriate. Plain error did not result in manifest injustice. *Mina, supra* at 680-681.

We affirm. As the prevailing party, defendant may tax costs pursuant to MCR 7.219.

/s/ Jane E. Markey

/s/ E. Thomas Fitzgerald