STATE OF MICHIGAN

COURT OF APPEALS

PHILLIP HOPKINS,

Plaintiff-Appellant,

v

CINEMA HOLLYWOOD, LLC,

Defendant-Appellee.

UNPUBLISHED
April 15, 2010

No. 290669
Saginaw Circuit Court
LC No. 07-066415-NO

Before: Davis, P.J., and Donofrio and Stephens, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) in this premises liability case. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, a business invitee at defendant's theater, alleged that he slipped on black ice upon stepping out of his vehicle in defendant's parking lot. Plaintiff had no problems with ice while driving to the theater or when he pulled into the parking lot. He dropped his wife off at the theater door, and she had no problem when she got out of the vehicle. Plaintiff had not used his windshield wipers on the way to the theater and had not removed snow from his vehicle that day. He did not recall any precipitation. Plaintiff said the parking lot looked clear. He also said he discovered he was on ice after he fell; he tried to get up and felt and saw the ice. He described a thin, smooth, clear sheet of ice through which he could see the blacktop.

Plaintiff argues that the trial court erred in determining that there was no genuine issue of material fact with regard to whether defendant had notice of the black ice such that it had a duty to remedy the situation or warn of it. We disagree.

> We review de novo a trial court's grant of summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The pleadings, affidavits, depositions, admissions, and other admissible documentary evidence submitted by the parties must be considered in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 538-539; 620 NW2d 836 (2001). Summary disposition is proper under MCR 2.116(C)(10) if the affidavits and other documentary evidence show that there is no genuine issue

> concerning any material fact and that the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). [*Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007)].

In a premises liability action, a plaintiff must prove (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. *Jones v Enertel, Inc*, 254 Mich App 432, 436-437; 656 NW2d 870 (2002). It is undisputed that plaintiff was an invitee. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000) sets forth the duty that was owed to him:

> An "invitee" is "a person who enters upon the land of another upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make [it] safe for [the invitee's] reception." [*Wymer v Holmes*, 429 Mich 66, 71, n 1; 412 NW2d 213 (1987), overruled on alternative grounds by *Neal v Wilkes*, 470 Mich 661; 685 NW2d 648 (2004).] The landowner has a duty of care, not only to warn the invitee of any known dangers, but the additional obligation to also make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards. *Id*. Thus, an invitee is entitled to the highest level of protection under premises liability law. *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 256; 235 NW2d 732 (1975).
>
> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if the owner: (a) knows of, or by the exercise of reasonable care would discover, the condition and should realize that the condition involves an unreasonable risk of harm to such invitees; (b) should expect that invitees will not discover or realize the danger, or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect invitees against the danger. *Id*. at 258, citing Restatement, § 343.

Preliminarily, plaintiff suggests that it was defendant's burden to establish a lack of notice. However, defendant's duty to protect arises only if defendant had actual or constructive notice of the hazard. Since duty is an element of a premises liability action, and plaintiff is required to establish the duty, *Benton v Dart Properties*, 270 Mich App 437, 440; 715 NW2d 335 (2006), the burden was with plaintiff.

Stitt, 462 Mich at 597, indicates that a landowner only owes an invitee a duty to protect if the landowner has actual notice or with the "exercise of reasonable care would discover, the condition." Plaintiff did not put forth any evidence to show that defendant failed to exercise reasonable care to discover the black ice. As the trial court noted, it would not be reasonable to presume that a landowner would have to inspect every inch of a parking lot. Moreover, plaintiff's own deposition testimony established that the parking lot appeared clear. Additionally, plaintiff's case rested on the assertion that he could not see the black ice before he fell. If the parking lot was clear except for this one patch of nearly invisible black ice, it cannot be said that defendant would have discovered the hazard with the exercise of reasonable care.

Accordingly, the grant of summary disposition on this basis was proper.

Given our determination on the notice issue, we need not address whether there was an issue of fact regarding whether the hazard was open and obvious. Similarly, we need not address whether there is a conflict between the open and obvious danger doctrine and the comparative negligence statute.

Affirmed.

/s/ Alton T. Davis
/s/ Pat M. Donofrio
/s/ Cynthia Diane Stephens