STATE OF MICHIGAN

COURT OF APPEALS

DONALD DEMCHIK,

Plaintiff-Appellant,

v

KEVIN COMATY,

Defendant-Appellee.

UNPUBLISHED
October 21, 2010

No. 292370
Macomb Circuit Court
LC No. 2008-003584-NO

Before: MURRAY, P.J., and K.F. KELLY and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition. We affirm.

Plaintiff injured his left arm when he attempted to open a locked glass window from the outside of defendant's rental home. On appeal, plaintiff argues the trial court erred in concluding that plaintiff's action was a premises liability claim and in applying the open and obvious doctrine to his case.

This Court reviews the grant or denial of a motion for summary disposition under MCR 2.116(C)(10) de novo. *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). A motion brought pursuant to MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Lind v Battle Creek*, 470 Mich 230, 238; 681 NW2d 334 (2004). A motion brought under MCR 2.116(C)(10) is reviewed "by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition is proper if there is "no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. This Court considers only that evidence which was properly presented to the trial court in deciding the motion. *Peña v Ingham Co Rd Comm'n*, 255 Mich App 299, 310; 660 NW2d 351 (2003).

Michigan law distinguishes between claims resulting from ordinary negligence and premises liability. *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001). "'The gravamen of an action is determined by reading the claim as a whole' and 'looking beyond the procedural labels to determine the exact nature of the claim.'" *Tipton v William Beaumont Hosp*, 266 Mich App 27, 33; 697 NW2d 552 (2005), quoting *Simmons v Apex Drug Stores, Inc*, 201 Mich App 250, 253; 506 NW2d 562 (1993), and *MacDonald v Barbarotto*, 161 Mich App 542,

547; 411 NW2d 747 (1987). "In a premises liability claim, liability emanates merely from the defendant's duty as an owner, possessor, or occupier of land." *Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005). Thus, when an injury develops from a condition of the land, rather than from an activity or conduct that created the condition, the action sounds in premises liability. *James*, 464 Mich at 18-19. Liability with respect to an ordinary negligence claim stems from the basic rule of the common law which "imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others." *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967).

We agree with the trial court that plaintiff's action sounds in premises liability, regardless of the label attached to the claims. *Randall v Harrold*, 121 Mich App 212, 217; 328 NW2d 622 (1982). After defendant told plaintiff the window was unlocked, plaintiff attempted to open the window by placing his hand on the window and pushing in a lateral, left-to-right motion. However, because the window was locked, the window broke when plaintiff pushed on the window, and plaintiff's left arm was severely cut. Based on the evidence presented by plaintiff, it was the window itself, and not defendant's conduct, that caused the laceration to his left arm. Although defendant told plaintiff the window was unlocked when it was not, defendant's conduct did not produce the resulting harm. Rather, it was plaintiff's action of attempting to open a locked window that created the harm. Because the condition of the window created the harm, plaintiff's cause of action is one of premises liability.

Because plaintiff's claim is founded in premises liability, the trial court also correctly applied the open and obvious doctrine to plaintiff's case. See *Hiner v Mojica*, 271 Mich App 604, 615-616; 722 NW2d 914 (2006) (The open and obvious doctrine is applicable only to premises liability actions, and product liability cases involving a failure to warn. The doctrine does not apply to actions involving claims of ordinary negligence). Plaintiff argues that if this Court determines his action sounds in premises liability, the condition of the glass window was not open and obvious.

> In a premises liability action, the plaintiff must prove (1) that the defendant had a duty to the plaintiff; (2) that the defendant breached that duty; (3) that the defendant's breach of duty caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007).

To begin, we must determine plaintiff's status on defendant's land. A licensee is a person who enters the land of another through the possessor's consent, such as a social guest. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). In contrast, an invitee is a person who enters the land of another for a commercial purpose and mutual benefit. *Id*. at 604-605. Plaintiff went to defendant's home to assist defendant in cleaning up the yard and installing an air conditioning unit in the glass window. Plaintiff stated defendant asked him onto the premises, and he did not expect to get paid for his assistance or derive a mutual benefit. Thus, plaintiff was a social guest and his status on defendant's premises was that of a licensee. The duty to a licensee is only to warn the licensee of any hidden dangers the possessor knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved. *Id*. at 596. The premises owner owes no duty of inspection, nor any duty to prepare the premises for the safety of the licensee. *Id*. Social guest licensees typically assume

the ordinary risks associated with their visit. *Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 64; 680 NW2d 50 (2004).

"[A] possessor of land has no obligation to take any steps to safeguard licensees from conditions that are open and obvious." *Pippin v Atallah*, 245 Mich App 136, 143; 626 NW2d 911 (2001). The test for whether something is "open and obvious" is objective, *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 5; 649 NW2d 392 (2002), and "'is whether an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon causal inspection[,]'" *Kennedy*, 274 Mich App at 713, quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). This means the test is not whether a particular plaintiff should have known the condition was hazardous, but whether a reasonable person in the plaintiff's position would have foreseen the danger. *Kennedy*, 274 Mich App at 713.

In reviewing the record in the light most favorable to plaintiff, there is no genuine issue of material fact regarding whether the glass window was open and obvious. Plaintiff injured his left arm when he attempted to open a locked glass window. Defendant's only duty to plaintiff as a licensee was to warn plaintiff of known hidden dangers on the premises, or to warn plaintiff of dangers about which defendant should have known. Plaintiff was fully aware that the window was made of glass and admitted that he knew to be careful around glass because he realized the danger of glass breaking. Plaintiff also admitted that he knew that if any pressure was applied to glass it could break, and stated that he did not need a warning regarding the likelihood of glass breaking when pressure was applied to it. The fact that the glass window was locked did not create a hidden danger that defendant had to warn plaintiff about. Rather, glass windows capable of being locked are ordinary occurrences in almost all houses and the dangers associated with applying pressure to glass window surfaces are foreseeable to reasonable people. *Id.* No hidden dangers regarding the glass window existed that would impose a duty to warn upon defendant. Therefore, the record provided does not raise a question of material fact regarding whether the glass window in defendant's house was open and obvious.

Finally, plaintiff argues that even if this Court finds the condition of the glass window to be open and obvious, the special aspect of the glass window being locked precludes application of the open and obvious doctrine to plaintiff's claim. Although the trial court determined the condition to be open and obvious, plaintiff argues that it failed to address whether the special aspect of the glass window precluded application of the open and obvious doctrine to plaintiff's claim.

Special aspects of an open and obvious condition can preclude the application of the open and obvious doctrine. Generally, if "special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect *invitees* from that risk." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001) (emphasis added). "Special aspects" exist when (1) a high likelihood of harm exists, such as a condition that is "effectively unavoidable" or (2) a condition poses an "unreasonably high risk of severe harm." *Id.* at 517-518. In those circumstances, the premises

possessor remains liable to the *invitee* to protect him from the danger. *Id*. However, plaintiff was a licensee on defendant's premises, and the special aspects of an open and obvious condition on a premises possessor's land is not applicable to persons with licensee status.[1] See *Pippin,* 245 Mich App at 143, citing *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995) (stating that "[only] [w]here there is a duty to a visitor to make a condition safe (i.e., the duty to an invitee), potential liability will remain for harm from conditions that are still unreasonably dangerous, despite their open and obvious nature."). Thus, the record provided does not raise a genuine issue of material fact regarding whether a duty was owed to plaintiff as a result of the alleged special aspect of the open and obvious condition.[2]

Affirmed.

Defendant may tax costs, having prevailed in full. MCR 7.217(A).

/s/ Christopher M. Murray
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio

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[1] Even if we assume, as defendant has, that plaintiff was an invitee, summary disposition was still appropriate because there were no special aspects to the glass window. *Lugo*, 464 Mich at 517-518.

[2] Plaintiff argues that a genuine issue of material fact exists regarding whether defendant's conduct was the proximate cause of plaintiff's injury. Since the trial court correctly determined defendant did not owe a duty to plaintiff, we need not address the issue.