

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM P. BROUSSEAU,

Plaintiff-Appellant,

v

DAYKIN ELECTRIC CORPORATION,

Defendant-Appellee.

UNPUBLISHED

March 27, 1998

No. 195259

Wayne Circuit Court

LC No. 95-518513-NO

Before: Gage, P.J., and Reilly and Jansen, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals by leave granted from an order granting defendant's motion for summary disposition. We reverse.

Plaintiff was a truck driver who was making a delivery to defendant on behalf of his employer. The only means of accessing defendant's loading dock was by a drive. There was a mound of snow and ice a couple feet high at the base of the drive. In order to make his delivery, plaintiff had to back his truck down the street and onto the drive leading to the loading dock. Plaintiff complained to one of defendant's employees about the mound of snow and ice, but nothing was done. Plaintiff then attempted to back his truck across the mound but was unsuccessful. On his second try, plaintiff drove backwards with more speed. The truck lurched over the mound, causing plaintiff to bounce in his seat. Plaintiff suffered a ruptured disc, which eventually led to a laminectomy.

The circuit court's grant of summary disposition is reviewed *de novo* to determine if defendant was entitled to judgment as a matter of law. *North Community Healthcare, Inc v Telford*, 219 Mich App 225, 227; 556 NW2d 180 (1996). Although the circuit court did not specify which subrule of MCR 2.116(C) formed the basis of its decision, we have reviewed the grant of summary disposition under MCR 2.116(C)(8), and not MCR 2.116(C)(10), because defendant's motion was based solely on the pleadings. See *Butler v Ramco-Gershenson, Inc*, 214 Mich App 521, 524; 542 NW2d 912 (1995). To properly proceed on a motion under MCR 2.116(C)(10), defendant should have supported its position that no genuine issue of material fact existed with supporting affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich

358, 362; 547 NW2d 314 (1996). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the plaintiff's complaint and should only be granted if the claim is so clearly unenforceable as matter of law that no factual development could possibly justify recovery. *ABB Paint Finishing, Inc v Nat'l Union Fire Ins Co*, 223 Mich App 559, 561; 567 NW2d 456 (1997); *Mallard v Hoffinger Industries, Inc (On Remand)*, 222 Mich App 137, 140; 564 NW2d 74 (1997).

The parties do not dispute that plaintiff was an invitee on defendant's premises. The invitor's legal duty to an invitee is "to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land" that the landowner knows or should know the invitees will not discover, realize, or protect themselves against. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995), quoting 2 Restatement Torts, 2d, § 343, pp 215-216. A claim that the invitor has breached the duty to exercise reasonable care to protect invitees from unreasonable risks of harm has traditionally been premised on three theories: failure to warn, negligent maintenance, or defective physical structure. *Id.* at 610.

In the present case, defendant correctly argued in support of its motion for summary disposition that plaintiff's complaint failed to state a "failure to warn" theory of liability because the danger posed by the mound of snow and ice was open and obvious, and the complaint alleged that plaintiff knew of the danger. However, neither the open and obvious nature of the danger nor plaintiff's particulars actions and knowledge is dispositive of plaintiff's theory of liability based on the negligent maintenance of the premises. *Id.* at 612. If the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor is required to undertake reasonable precautions. *Id.* at 611. A possessor of land does owe a duty to take reasonable measures within a reasonable period after an accumulation of snow and ice to diminish the hazard of injury to an invitee. *Anderson v Wiegand*, 223 Mich App 549, 554; 567 NW2d 452 (1997). The material issue precluding summary disposition in the present case is whether defendant had reason to expect that plaintiff would proceed to encounter the danger posed by the mound of ice and snow because "to a reasonable man in his position the advantages of doing so would outweigh the apparent risk." *Bertrand, supra* at 612, quoting 2 Restatement of Torts, 2d, § 343A, comment f, p 220. Factual development is necessary to determine this issue as well as the issue of the standard of care defendant owed under the circumstances. *Id.* at 611-612. Defendant therefore was not entitled to summary disposition as a matter of law.

Although not material to a motion under MCR 2.116(C)(8), we note that the affidavit filed by plaintiff in opposition to defendant's motion for summary disposition, viewed most favorably to plaintiff, is supportive of plaintiff's position that he had no choice but to attempt backing his truck over the mound of snow and ice so that he could complete his job. A business invitee's compulsion or motivation can be a relevant factor in determining the business invitor's liability under plaintiff's proposed theory of negligence. See *Singerman v Municipal Service Bureau, Inc*, 455 Mich 135, 144; 565 NW2d 383 (1997) (opinion of Weaver, J.). However, as noted above, the material issue underlying plaintiff's claim is what defendant had reason to expect from a reasonable person in plaintiff's position. *Bertrand, supra* at 612. Neither party submitted evidence to the circuit court on defendant's expectations. In fact, as we have already noted, defendant's motion for summary disposition was based

solely on the pleadings. Thus, even assuming for purposes of our review that it was appropriate for the circuit court to consider plaintiff's affidavit when deciding defendant's motion, we hold that the circuit court incorrectly decided the issue of what defendant had reason to expect from a reasonable person in plaintiff's position as a matter of law.

Reversed and remanded for further proceedings on plaintiff's complaint. We do not retain jurisdiction.

/s/ Hilda R. Gage

/s/ Kathleen Jansen

I concur in result only.

/s/ Maureen Pulte Reilly