STATE OF MICHIGAN

COURT OF APPEALS

ADAM HOJARA,

Plaintiff-Appellant,

v

DAIMLER CHRYSLER CORPORATION f/k/a CHRYSLER CORPORATION,

Defendant-Appellee/Cross-Appellant,

and

TORRE & BRUGLIO, INC.,

Defendant-Appellee/Cross-Appellee.

UNPUBLISHED
February 1, 2002

No. 226925
Macomb Circuit Court
LC No. 99-001681-NO

Before: Sawyer, P.J., and O'Connell and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right and defendant Daimler Chrysler cross appeals by leave granted the trial court's order granting defendants' motions for summary disposition. We affirm in part and reverse in part. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

When walking on a sidewalk that abutted defendant Daimler Chrysler's premises, plaintiff stepped off the edge of the sidewalk and his foot hit a piece of concrete that anchored a fencepost into the ground. He fell and suffered injuries. The fencepost surrounds Daimler Chrysler's property. The bottom of the fencepost, and thus the concrete anchor, were partially obscured by grass and weeds that grew along the fence and around the fencepost.

Plaintiff brought this premises liability action against Daimler Chrysler and defendant Torre & Bruglio, the landscaping company hired by Daimler Chrysler to maintain its premises. Daimler Chrysler filed a cross-claim against Torre & Bruglio, alleging claims of breach of contract. Daimler Chrysler alleged that Torre & Bruglio breached their contract by failing to name Daimler Chrysler as an additional insured on its insurance and in refusing Daimler Chrysler's request to defend it in this action.

Daimler Chrysler moved for summary disposition with respect to plaintiff's claim, arguing that the condition plaintiff alleges resulted in his injury was open and obvious and therefore Daimler Chrysler owed him no duty. While there existed a question whether plaintiff was to be considered a trespasser or a licensee, Daimler Chrysler argued that the question was irrelevant in light of the open and obvious nature of the condition.

Less than one week before the hearing on Daimler Chrysler's motion, Torre & Bruglio moved for summary disposition, joining with Daimler Chrysler. However, Torre & Bruglio sought dismissal of not only plaintiff's claim, but Daimler Chrysler's cross-claims against it.

The trial court noted that in plaintiff's deposition, he admitted that had he wanted to, he could have noticed the condition of the fencepost he hit with his foot. It decided that it was unnecessary to determine plaintiff's status as a trespasser or licensee, finding that even if plaintiff was a licensee, the open and obvious nature of the condition removed Daimler Chrysler's duty. It granted defendants' motions for summary disposition regarding plaintiff's claim. The court concluded that in light of the dismissal of plaintiff's claim, Daimler Chrysler's cross-claim against Torre & Bruglio should also be dismissed.

Plaintiff argues that the trial court erred in granting defendants' motions for summary disposition. He asserts that the trial court erroneously relied on a statement from plaintiff's deposition that he could have noticed the cemented post, but did not. We disagree.

A decision on a motion for summary disposition is reviewed de novo. *Singerman v Municipal Serv Bureau, Inc*, 455 Mich 135, 139; 565 NW2d 383 (1997). A motion brought pursuant to MCR 2.116(C)(10) (no genuine issue of material fact) tests the factual support for a claim. To rule on the motion, the trial court must consider the pleadings, affidavits, depositions and all other documentary evidence submitted by the parties. MCR 2.116(G); *Singerman*, *supra*. The court must view the evidence and all reasonable inferences drawn from the evidence in favor of the nonmoving party, giving the nonmoving party the benefit of any reasonable doubt. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). The reviewing court must "determine whether any genuine issue of material fact exists in order to prevent entering a judgment for the moving party as a matter of law." *Id*.

An invitor has a duty to exercise reasonable care to protect invitees from unreasonable risks of harm posed by dangerous conditions of the land that the invitor knows or should know will not be discovered, realized or protected against by invitees. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). However, if the condition is open and obvious, the invitor generally has no duty to warn invitees of the condition. *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 10; 574 NW2d 691 (1997). The question whether a condition is open and obvious depends on whether it is reasonable to expect an average person of ordinary intelligence to discover the dangerous condition upon casual inspection. *Id*. A landowner has a duty to take reasonable precautions to protect invitees of risks posed by open and obvious condition if special aspects of the condition make that risk unreasonably dangerous. *Lugo v Ameritech Corp*, 464 Mich 512, 517; 629 NW2d 384 (2001).

Plaintiff stated in his deposition that he could have seen the concrete, but did not. He explained that he was looking down and fell off the sidewalk. Plaintiff complains that the trial court took this testimony out of context. However, we read the testimony as evidence that

plaintiff conceded that he could have seen the condition. Moreover, it is clear that the condition of the fencepost was open and obvious, albeit somewhat obscured by the weeds growing around it. It is reasonable to expect that an average person of ordinary intelligence would have discovered the condition upon casual inspection. Thus, the trial court correctly concluded that the condition was open and obvious. Plaintiff does not assert that the condition posed a risk that was unreasonably dangerous. Therefore, the trial court properly granted defendants' motions for summary disposition.

On cross appeal, Daimler Chrysler argues that the trial court erred in granting Torre & Bruglio's motion for summary disposition with respect to its cross-claim. We agree.

Daimler Chrysler brought breach of contract claims against Torre & Bruglio, based on their contract for landscape maintenance services. Daimler Chrysler seeks damages, such as the fees and expenses incurred in defending plaintiff's suit, arguing that Torre & Bruglio was required under the contract to name it as an additional insured in its insurance and provide it a defense to actions brought against it based on the service provided to it by Torre & Bruglio. The dismissal of plaintiff's negligence claim did not resolve Daimler Chrysler's breach of contract claims against Torre & Bruglio. Torre & Bruglio have not demonstrated that there is no genuine issue of material fact and it was entitled to judgment as a matter of law on Daimler Chrysler's breach of contract claims. MCR 2.116(C)(10); *Morales*, *supra*. Therefore, the trial court erred in granting Torre & Bruglio's motion for summary disposition as to Daimler Chrysler's cross-claim.

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Peter D. O'Connell
/s/ Brian K. Zahra