STATE OF MICHIGAN

COURT OF APPEALS

RAYMOND J. HADEN,

Plaintiff-Appellee,

v

WALDEN POND CONDOMINIUM ASSOCIATION, PONDS COOPERATIVE HOMES, INC, and McKINLEY PROPERTIES, INC,

Defendants-Appellants.

UNPUBLISHED
December 21, 2004

No. 249476
Ingham Circuit Court
LC No. 02-001008-NO

Before: Meter, P.J., and Wilder and Schuette.

PER CURIAM.

Defendants appeal by leave granted the order denying their motion for summary disposition in this slip and fall case. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff brought this premises liability action after he slipped and fell while running on a leaf-covered path on the grounds of an apartment/condominium complex owned and maintained by defendants. Defendants moved for summary disposition under MCR 2.116(C)(8) and (10). The trial court denied the motion, finding a factual question regarding the open and obvious nature of the hazard. This Court granted defendant's application for leave to appeal.

A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim. Summary disposition under MCR 2.116(C)(10) should be granted where the affidavits or other documentary evidence show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). To avoid summary disposition under MCR 2.116(C)(10) the party opposing the motion must show, via affidavit or documentary evidence, that a genuine issue of fact exists for trial. *Smith*, 460 Mich 455-456 n 2; MCR 2.116(G)(4).

In negligence actions, whether a defendant owed a plaintiff a duty of care is a threshold question of law for the trial court to decide. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 95; 485 NW2d 676 (1992). The rule that a premises owner has no duty to warn invitees of open and obvious dangers "is a defensive doctrine that attacks the duty element that a plaintiff must establish in a prima facie negligence case." *Riddle*, 440 Mich 95-96.

The owner or possessor of premises has a general duty 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. However, that duty does not extend to dangers known to the invitee or which are so obvious that the invitee might reasonably be expected to discover them, unless there are special aspects of the condition as to which the possessor should anticipate harm despite the invitee's knowledge of the danger. *Lugo v Ameritech* Corp, 464 Mich 512, 516-517; 629 NW2d 384 (2001). An open and obvious danger presents such special aspects when circumstances render the danger unavoidable or impose an unreasonably high risk of severe harm. *Id*. 518-520. The open and obvious danger doctrine applies to claims of failure to warn as well as claims of failure to maintain premises. *Joyce v Rubin*, 249 Mich App 231, 236; 642 NW2d 360 (2002). The test to determine whether 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 on casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

Plaintiff's deposition testimony established that he saw that the path was completely covered over with leaves at the time he began to jog on it. The presence of fallen leaves on the ground in late October is unremarkable. The potential danger posed from slipping on these leaves or tripping over something hidden under the leaves was open and obvious upon casual observation. A reasonable person in plaintiff's position would foresee the danger, and summary disposition was warranted. *Joyce, supra.*

Reversed and remanded for entry of judgment for defendants. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Kurtis T. Wilder
/s/ Bill Schuette