STATE OF MICHIGAN

COURT OF APPEALS

DOUGLAS DOEZEMA,

Plaintiff-Appellant,

v

BAY HARBOR YACHT DOCKS and BAY HARBOR COMPANY, LLC,

Defendants-Appellees.

UNPUBLISHED
November 21, 2006

No. 267681
Emmet Circuit Court
LC No. 05-008569-NO

Before: Fort Hood, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendants. We affirm.

While docked at defendants' premises, plaintiff and his fellow crewmen were engaging in routine boat-cleaning procedures, including a pump out[1] of the boat. In preparation for the pump out, a dockhand removed a cover from a hatch in the dock, exposing the piping to which the pump out hose would be connected. Plaintiff sustained injuries when he walked backward into the open hatch. Plaintiff brought suit against defendants, and the trial court granted summary disposition in favor of defendants under MCR 2.116(C)(10).

On appeal, plaintiff argues that the trial court erred in determining that the dangerous condition on the docks was open and obvious and that there were no special aspects of the condition that created an unreasonable risk of harm. We review de novo a trial court's decision on a motion for summary disposition, examining the entire record to determine whether the moving party was entitled to judgment as a matter of law. *Stopczynski v Woodcox*, 258 Mich App 226, 229; 671 NW2d 119 (2003). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint and, after considering the evidence in the light most favorable to the

[1] A pump out is a procedure in which a boat's waste holding tank is emptied using a vacuum-like process. One end of a hose is connected to a fitting on the holding tank, and the other end is attached to a pipe located through a hatch under the dock that is linked to the sewer system.

nonmoving party, summary disposition is appropriate if the proffered evidence fails to establish a genuine issue regarding any material fact." *Id.*

"To establish a prima facie case of negligence, 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." *Teufel v Watkins*, 267 Mich App 425, 427; 705 NW2d 164 (2005). "A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Id.* An invitor is liable for injuries resulting from unsafe conditions caused by the invitor's active negligence or, if otherwise caused, where the invitor knew of the unsafe condition or the condition is of such a character or has existed a sufficient length of time that the invitor should have had knowledge of it. *Berryman v Kmart Corp*, 193 Mich App 88, 92; 483 NW2d 642 (1992). "The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it." *Teufel, supra* at 427; *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609-610; 537 NW2d 185 (1995).

"Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger on casual inspection." *Teufel, supra* at 427; *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). "If special aspects of a condition make an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions to protect an invitee from that risk." *Teufel, supra* at 428; *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001). "But where no such special aspects exist, the 'openness and obviousness should prevail in barring liability.'" *Teufel, supra* at 428, quoting *Lugo, supra* at 517-518. "[I]f the particular . . . condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger." *Bertrand, supra* at 611.

In *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 491, 497-498; 595 NW2d 152 (1999), this Court found that summary disposition in favor of the defendant was appropriate on the basis of the open and obvious doctrine where the plaintiff tripped over a utility wire while she was washing windows outside her mobile home. The plaintiff admitted that "if [she] was looking for [the wire she] would have seen it," but that she did not because "[she] was looking at windows and where [she] was putting [her] stuff." *Id.* at 492. This Court determined that the plaintiff failed to establish a genuine issue of material fact regarding the open and obvious nature of the utility wire, based on pictures of the wire in its surroundings as well as the plaintiff's deposition testimony that "she would have seen the wire if she had looked up from her work." *Id.* at 497-498.

Similarly, in this case, plaintiff failed to establish a genuine issue of material fact that the open hatch was not open and obvious.[2] Plaintiff's argument that the danger posed by the open hatch was not open and obvious is based on his assertion that the dockhand opened the hatch cover within seconds of plaintiff falling into it. Plaintiff asserts that he could not have seen the open hatch under these circumstances, and thus the danger was not open and obvious. However, plaintiff admits that even though the hatch cover had been taken off mere seconds before he fell into it, he would have seen the open hatch if he had been walking forward rather than backward. Further, plaintiff acknowledged that he was aware that the boats needed to be pumped out and that the procedure required opening the hatch cover. He also admitted that a boat dock is a busy place with many people performing various tasks. Many of those could conceivably result in risks of tripping and falling for those not keeping an eye out for changing conditions and associated dangers. In these circumstances, the open and obvious doctrine required that plaintiff continually glance over his shoulder while walking backward to avoid dangers that may not have been there even seconds before. Accordingly, the trial court properly granted summary disposition in favor of defendant.

Plaintiff also argues that the trial court erred in determining that there were no special aspects of the open and obvious condition that created an unreasonable risk of harm so as to justify the imposition of liability on defendants. "[O]nly those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious doctrine." *Lugo*, *supra* at 519.

The evidence established that the hole exposed by the open hatch was not particularly large and that the hatch contained a network of pipes that would prevent anyone stepping into the hatch from falling to the water below. Although falling into the hatch and hitting the pipes might cause injury, the risk of harm created by the open hatch was neither particularly severe nor uniquely high. Additionally, the hatch opening was not unavoidable. Finally, the fact that the environment was changed when the hatch cover was opened is immaterial and does not operate to remove the case from analysis under the open and obvious doctrine. As in *Millikin*, *supra* at 499, plaintiff's only asserted basis for finding that the open hatch was dangerous was that he did

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[2] For purposes of reviewing the trial court's decision on a motion for summary disposition, we consider the evidence in the light most favorable to plaintiff, as the nonmoving party. *Stopczynski*, *supra* at 229. Accordingly, we give no credence to the following evidence proffered by defendants: the dockhand's testimony that he removed the hatch cover "at least a couple [of] minutes" before plaintiff fell; testimony from a crew captain as well as the ship's mechanic that plaintiff was potentially inebriated when he fell, "moving around erratically just all over the place," "highly animated," "sweating profusely, [] reeked of Altoids . . . pupils [] dilated," "spraying [] dramatically . . . [a]nd not spraying off one part of a boat before moving off to the next"; and testimony from a crew captain that because plaintiff overslept the previous day and had not refueled his boat, the crew was irritated with plaintiff shirking his responsibilities, leading plaintiff, on the evening of the incident, to "put[] on a show in front of everybody . . . 'Look at me, I'm working. I've got the hose. We've got to clean these boats, guys. Let's get moving' like [plaintiff] was in charge or something."

not see it. Because plaintiff failed to establish anything unusual about the open hatch and failed to present any facts that the open hatch posed an unreasonable risk of harm, notwithstanding its open and obvious nature, the trial court properly granted summary disposition in favor of defendant. *Id.*

We affirm.

/s/ Richard A. Bandstra
/s/ Pat M. Donofrio