STATE OF MICHIGAN

COURT OF APPEALS

JEFFREY JACOBS, M.D., and CATHERINE JACOBS,

Plaintiffs-Appellants,

v

PAGE ONGE,

Defendant-Appellee,

and

TERRY PATIENT AND B. PATIENT AUCTION SERVICE, INC.,

Defendants.

UNPUBLISHED
January 29, 2008

No. 276719
Houghton Circuit Court
LC No. 05-013053-NO

Before: Bandstra, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court order granting defendant Page Onge's motion for summary disposition under MCR 2.116(C)(10) in this premises liability claim. We affirm in part, reverse in part, and remand for further proceedings. This appeal is being decided without oral argument under MCR 7.214(E).

Plaintiffs were present at an auction at a house owned by defendant.[1] Some of the items to be auctioned were in the basement of the home. Plaintiffs and several others went inside the basement to see the items for sale at the direction of Terry Patient, who was running the auction. While in the basement, plaintiff Jeffrey Jacobs[2] struck his head on an overhead low beam and allegedly suffered optic nerve damage to his left eye. During his deposition, plaintiff testified

[1] References to "defendant" in the singular throughout this opinion are to Page Onge only.

[2] Because plaintiff Catherine Jacobs presented only a derivative claim for loss of consortium, references to "plaintiff" in the singular throughout this opinion are to Jeffrey Jacobs only.

that the basement was dark and the only light came from small casement windows. Plaintiffs filed a complaint alleging, *inter alia*, premises liability and general negligence against defendant. Plaintiffs appeal following the trial court's grant of summary disposition in defendant's favor.

Plaintiffs first argue that the trial court erred in granting summary disposition to defendant on their premises liability claim based on a holding that the beam was an open and obvious danger. We review a trial court's decisions on summary disposition de novo. *Cowles v Bank West*, 476 Mich 1, 13; 719 NW2d 94 (2006). "Summary disposition under MCR 2.116(C)(10) is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id*. at 32. This Court must consider the pleadings, affidavits, depositions, admissions, and documentary evidence when reviewing a motion for summary disposition under MCR 2.116(C)(10). *Id*.; *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Whether a duty exists in a negligence case is generally a question of law for the court to decide. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 95; 485 NW2d 676 (1992). However, the existence of facts, which give rise to a duty, is a question of fact for the jury to decide. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617; 537 NW2d 185 (1995); *Bonin v Gralewicz*, 378 Mich 521, 526-527; 146 NW2d 647 (1966). Therefore, if the determination that the defendant owed a duty to the plaintiff rests on the resolution of disputed facts, those facts, and the question of the existence of a duty, must be submitted to the jury with an appropriate instruction. *Id.*

Viewing the evidence in a light most favorable to plaintiffs, we conclude that there were genuine issues of material fact as to whether the dangerous condition was open and obvious.

To succeed in a premises liability cause of action, a plaintiff must prove all of the elements of negligence: "(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." *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007), citing *Jones v Enertel, Inc*, 254 Mich App 432, 436-437; 656 NW2d 870 (2002).

The general rule is that "a premises possessor owes a 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." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001), citing *Bertrand, supra* at 609. However, an invitor is not an "absolute insurer[] of the safety of [its] invitees." *Id.* at 517. Where a dangerous condition is open and obvious, the premises owner is protected from liability for harm caused by that condition so long as there are no special aspects of the condition that make even an open and obvious risk unreasonably dangerous. *Id.* A condition is open and obvious if "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection[.]" *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). The focus should be "on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff." *Lugo, supra* at 524. Also, the determination of whether a condition is open and obvious depends on "the characteristics of a reasonably prudent person,"

not "the characteristics of a particular plaintiff." *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329 n 10; 683 NW2d 573 (2004), citing *Bertrand, supra* at 617.

An average user of ordinary intelligence would likely have been able to discover the danger and risk presented by the relevant beam on casual inspection if the critical room had proper lighting. However, according to plaintiff's deposition testimony, the basement was "very dark" and the only light source directly in the relevant room came from small casement windows. Given this testimony about the lighting, we conclude that there is a question of fact as to whether the beam constituted an open and obvious condition at the time of the incident. In this regard, this case is analogous to others in which this Court has held that a factual dispute concerning the lighting in an area rendered the question whether a danger was open and obvious a factual one. See *Abke v Vandenberg*, 239 Mich App 359, 362-363; 608 NW2d 73 (2000) (concluding that the trial court properly denied a motion for a directed verdict and judgment notwithstanding the verdict where there was conflicting evidence about whether the truck bay at issue was lighted such that it would have been open and obvious); *Knight v Gulf & Western Properties, Inc*, 196 Mich App 119, 127; 492 NW2d 761 (1992) (concluding that an interior loading dock that was obscured by the dark was not open and obvious as a matter of law); see also *Boyle v Preketes*, 262 Mich 629, 633; 247 NW 763 (1933) (noting that, in the context of contributory negligence, an ordinary step might be a "concealed danger" where there is inadequate lighting). In the instant case, plaintiff's claim that he could not see the beam due to the inadequate lighting renders this question one for the fact-finder.[3] Thus, the trial court improperly granted defendant's motion for summary disposition on the ground that the danger was open and obvious as a matter of law.

Plaintiffs also argue that the trial court erred in granting defendant summary disposition as to their general negligence claim. While we disagree with the trial court's decision to hold that the danger was open and obvious as a matter of law, we nevertheless conclude that summary disposition was proper as to the general negligence claim.

In general negligence claims, the underlying theory of liability determines whether the open and obvious doctrine applies. *Laier v Kitchen*, 266 Mich App 482, 493 (Neff, J.), 502 (Hoekstra, P.J., concurring); 702 NW2d 199 (2005). A case may simultaneously have a claim alleging premises liability and a general negligence claim based upon the defendant's conduct. *Id.* at 493. Alleging a breach of a duty of reasonable care focuses on the defendant's conduct rather than any latent defect in the premises. *Id.* at 493-494; see also *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001). If alleging a breach of a duty of reasonable care, a general negligence claim is independent from a premises liability claim. *Laier*, *supra*.

"[T]he 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*

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[3] Defendant maintains that plaintiff's admission that the lighting was sufficient to see the debris on the floor and the other individuals in the room with him prevent him from claiming that the lighting was inadequate to see the beam. This does not necessarily follow, however, in that the debris and individuals were not located near the ceiling of the room.

Beaumont Hosp, 266 Mich App 27, 33; 697 NW2d 552 (2005) (quotation marks and citations omitted). In the instant case, plaintiffs argue that defendant Onge breached a separate duty of care by "direct[ing] the auction attendees to his basement to bid on items" knowing that the basement was not set up for an auction or safe for such an event. However, the underlying theory of liability is simply the same as plaintiffs' premises liability claim based on the condition of the premises. Plaintiffs do not appear to claim that defendant somehow enhanced the danger on the property at the specific time of the incident, such as by deliberately placing the items in a more dangerous location or by removing the light bulbs before the auction. Nor does the record support such a theory, even when viewed in the light most favorable to plaintiffs. Rather, defendant simply provided access to the basement for the auction, a portion of which arguably contained a dangerous condition. Plaintiffs' general negligence claim is, thus, not truly distinct from their premises liability claim. Accordingly, the trial court properly granted summary disposition as to the general negligence claim.

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

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