STATE OF MICHIGAN

COURT OF APPEALS

LAWRENCE LOVELAND,

Plaintiff-Appellant,

v

SPECTRUM HEALTH, SPECTRUM HEALTH HOSPITAL, and SCHINDLER ELEVATOR CORPORATION,

Defendants-Appellees.

UNPUBLISHED
November 18, 2008

No. 278497
Kent Circuit Court
LC No. 05-012014-NO

Before: Markey, P.J., and Sawyer and Kelly, JJ.

PER CURIAM.

Plaintiff appeals by right in this premises liability case the trial court's May 4, 2007, opinion and order, which granted all defendants summary disposition and denied the motion of defendants Spectrum Health and Spectrum Health Hospital[1] to file a cross-complaint against defendant Schindler Elevator Corporation. We affirm.

Plaintiff fractured his left index finger after the doors of a freight elevator at Spectrum Health Hospital's Butterworth Campus closed on his hand. Plaintiff filed suit against Spectrum asserting that Spectrum was negligent in failing to properly inspect, maintain, warn, and take other reasonable precautions to protect invitees from dangerous conditions on the premises. Because there was a contract between Schindler and Spectrum to have Schindler inspect and maintain the freight elevator, plaintiff also asserted that Schindler was negligent in carrying out its duties under the contract, and the elevator was defective.[2]

We review de novo a trial court's decision to grant summary disposition. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). We review the record in the same manner as

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[1] The two Spectrum defendants are referred to as "Spectrum" and will be treated as one entity for purposes of this opinion.

[2] On appeal, plaintiff raises no issue with respect to the grant of summary disposition awarded to Schindler. As such, we affirm summary disposition in Schindler's favor.

the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998).

Summary disposition was granted here under MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). In evaluating a motion for summary disposition brought under this subsection, a reviewing court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Coblentz*, *supra* at 567-568. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); MCR 2.116(G)(4); *Coblentz*, *supra* at 568.

> The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules. [*Maiden, supra* at 121.]

The tort of negligence is commonly recognized as having four elements: 1) a duty 2) the breach of that duty 3) proximate cause and 4) damages. See *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). The "duty" element pertains to "whether the defendant is under *any* obligation to the plaintiff to avoid negligent conduct." *Moning v Alfono,* 400 Mich 425, 437; 254 NW2d 759 (1977). Duty is a question of law for the court to decide. *Id*. at 436-437.

Premises liability law has been summarized by the Michigan Supreme Court as follows:

> Generally, a premises possessor owes a duty of care 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. This duty generally does not encompass a duty to protect an invitee from "open and obvious" dangers. However, if there are "special aspects" of a condition that make even an "open and obvious" danger "unreasonably dangerous," the premises possessor maintains a duty to undertake reasonable precautions to protect invitees from such danger. To determine whether a condition is "open and obvious," or whether there are "special aspects" that render even an "open and obvious" condition "unreasonably dangerous," the fact-finder must utilize an objective standard, i.e., a reasonably prudent person standard. That is, in a premises liability action, the fact-finder must consider the "condition of the premises," not the condition of the plaintiff. [*Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 328-329; 683 NW2d 573 (2004) (citations omitted).]

The test to determine if 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 upon casual inspection. *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002). Where a risk is known to the invitee, there is no duty to protect or warn the invitee unless the possessor should anticipate the harm despite knowledge of it on behalf of the invitee. *Riddle v McLouth Steel*

Products Corp, 440 Mich 85, 96; 485 NW2d 676 (1992). In analyzing whether a possessor should "anticipate the harm," the Court in *Lugo v Ameritech Corp*, 464 Mich 512, 525; 629 NW2d 384 (2001), noted:

> Simply put, there must be something out of the ordinary, in other words, special, about a particular open and obvious danger in order for a premises possessor to be expected to anticipate harm from that condition. Indeed, it seems obvious to us that if an open and obvious condition lacks some type of special aspect regarding the likelihood or severity of harm that it presents, it is not unreasonably dangerous. We cannot imagine an open and obvious condition that is unreasonably dangerous, but lacks special aspects making it so.

Therefore, an invitor's duty to warn only remains if special aspects of the condition exist. *Id*. at 516-518.

We conclude after viewing the evidence in a light most favorable to plaintiff, there is no genuine issue of material fact concerning the astragal's function, or the open and obvious nature of the freight elevator's doors. The testimony supports the conclusion that plaintiff did not believe, as argued, that the presence of the astragal indicated that the doors were equipped with a safety device that would prevent them from closing on a person. Plaintiff tried to stop the doors from closing with his left hand under the upper door. The astragal is a rubber edge on the bottom of that door. Plaintiff's action did not cause the doors to stop closing; yet, defendant left his hand under the door while he tried to push the door up, using his right hand on the face of the door. The only inference that can be argued or made is that plaintiff did not believe the astragal was a safety device that would prohibit the doors from closing. Further, Justin McClung testified that he did not think that the astragal was going to stop the doors from closing because the doors were manually operated. He noted that there was nothing electronic or automatic about the freight elevator. Troy Smith testified that he thought the freight elevator doors were equipped with a safety device, but Smith also indicated that this conclusion was based on his experience with elevators in general, not on his experience with freight elevators. Robert Perry appears to be the only person who testified that he thought the doors might be equipped with a safety device, but his testimony was unsure. We find that the average user of ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. Therefore, viewing the evidence in a light most favorable to plaintiff, there is no genuine issue of material fact concerning the astragal.

Moreover, the condition of the elevator doors was open and obvious. The sign inside the elevator clearly indicated that "This is not a passenger elevator. No persons other than the operator and the freight handlers are permitted to ride on this elevator." These signs clearly put all riders are on notice that this was not a passenger elevator. It is different. It is a freight elevator. There is nothing about this freight elevator that would lead a reasonably prudent person to believe that it operates the same as a passenger elevator. The freight elevator doors are manually operated. Passenger elevators have power doors. The freight elevator's two outer steel doors close horizontally. On passenger elevators, the doors close vertically. In order to get these outer freight elevator doors to close, a passenger must get on the elevator, then manually pull a strap. The two outer doors close with the top and bottom doors simultaneously closing and meeting in the middle. The inner door is made of wood and closes by manually pulling a strap as well. This door is like a garage door, which closes from top to bottom. Both sets of doors will

only close after someone starts to pull them shut. Freight elevators are also larger than passenger elevators and do not have furnished interiors. Although a passenger elevator typically contains an automatic safety device to prevent the doors from closing if obstructed, an average user of ordinary intelligence would have discerned that since because this elevator is completely different from a passenger elevator and the operation of its doors was entirely manual, there was likely no safety device to automatically prevent the doors from closing on someone. The average person with ordinary intelligence would have discovered the risk of putting his hand in between two 200 to 250 pound manually operated steel doors to try to prevent the doors from closing. Because the condition was open and obvious, the open and obvious doctrine applies and precludes the existence of a duty to plaintiff unless there were special aspects that made the condition unreasonably dangerous.

Plaintiff argues that the hoist-way doors were a special aspect because they were unavoidable in the sense that delivery persons inevitably confront them in order to use the freight elevator and transport their product. Plaintiff argues that the freight elevator also posed a substantial risk of severe injury because people habitually stop elevator doors from closing by putting their hand, arm, or other body part between them. We find that plaintiff's arguments are without merit.

In *Lugo*, *supra* at 518, the Michigan Supreme Court cited the following two examples of conditions that would constitute special aspects: (1) an unguarded thirty foot deep pit in the middle of a parking lot resulting in a fall of an extended distance and (2) standing water at the only exit of a commercial building resulting in the condition's being unavoidable because no alternative route exists. The condition at issue is unlike those. The danger of manually operated freight elevator doors closing on someone does not present an unreasonably high risk of severe injury. All the injuries sustained by the individuals identified in plaintiff's brief were not severe injuries. Therefore, no evidence was presented which indicates that there is an unreasonably high risk involved in sustaining severe injury. And, the condition was avoidable. If plaintiff had not placed his hand between two closing 200 to 250 pound steel doors, he would have avoided the risk of injury. Viewing the evidence in a light most favorable to plaintiff, we conclude also that there is no genuine issue of material fact whether there were special aspects to the condition that would make it unreasonably dangerous so as to render the condition not open and obvious. Therefore, Spectrum did not owe plaintiff a duty based on special aspects of the condition. Plaintiff's common law negligence action was properly dismissed.

Plaintiff also argues that the statutory and regulatory scheme imposed a duty that cannot be excused by the open and obvious doctrine. In this case, plaintiff is referring to rules enacted by the elevator safety board in compliance with the Administrative Procedures Act. See 1979 AC, R 408.8101-8138.[3] Although plaintiff's complaint alleges a failure to inspect, maintain, repair, etc., the complaint does not allege that a specific statutory duty has been violated. Plaintiff failed to state a cause of action based on statute; consequently, summary disposition

[3] These rules were rescinded effective December 31, 2003, 2003 MR 23, and were apparently replaced by 2003 AAAS, R 408.7001 *et seq*.

under MCR 2.116(C)(8) was proper on this alleged claim. The trial court did not err in granting Spectrum summary disposition because plaintiff cannot recover from Spectrum based on the alleged breach of an independent statutory duty.

We affirm.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Kirsten Frank Kelly