STATE OF MICHIGAN

COURT OF APPEALS

DAVID F. SKUBA,

Plaintiff-Appellant,

v

DAVID GOMEZ,

Defendant-Appellee.

UNPUBLISHED
March 3, 2009

No. 281296
Oakland Circuit Court
LC No. 2006-078214-NO

Before: Jansen, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting summary disposition in favor of defendant. We affirm.

Plaintiff tripped and fell over a rock in defendant's yard while walking backward away from the sound of a large dog's chain, sustaining a broken leg. On appeal, plaintiff argues that genuine issues of material fact existed regarding whether the rock, in connection with the dog, was an open and obvious danger and whether special aspects of the dog and rock rendered them unreasonably dangerous. We disagree.

We review de novo a trial court's decision on a motion for summary disposition. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for a claim; the motion should be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *The Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 55-56; 744 NW2d 174 (2007). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue on which reasonable minds might differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition under subrule (C)(10), a court must review the pleadings, affidavits, depositions, admissions, and other documentary evidence in a light most favorable to the nonmoving party. *Cowles v Bank West*, 476 Mich 1, 32; 719 NW2d 94 (2006).

In a premises liability action, the plaintiff must prove the four elements of negligence: (1) that the defendant had a duty to the plaintiff, (2) that the defendant breached that duty, (3) that the breach proximately caused an injury, and (4) that the plaintiff suffered damages as a result. *Taylor v Laban*, 241 Mich App 449, 452; 616 NW2d 229 (2000). Different standards of

care are owed to a plaintiff in accordance with the plaintiff's status on the land. The determination of the status of the visitor depends primarily on the purpose of the landowner in inviting the visitor onto the premises. *Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 60; 680 NW2d 50 (2004). "'[T]o establish invitee status, a plaintiff must show that the premises were held open for a *commercial* purpose.'" *Id*. at 61, quoting *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 604; 614 NW2d 88 (2000) (emphasis in original). An invitor has a common law duty to exercise reasonable care to warn or protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech*, 464 Mich 512, 516; 629 NW2d 384 (2001).

The basic duty to warn or protect an invitee does not generally include removal of open and obvious dangers. "'"[W]here the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee."'" *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 3; 649 NW2d 392 (2002) (citations omitted). The open and obvious doctrine is not an exception to the duty owed to invitees, but instead is "an integral part of the definition of that duty." *Lugo*, 464 Mich at 516. A danger 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.'" *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 713; 737 NW2d 179 (2007), quoting *Novotney v Burger King (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). The test is objective, meaning a court does not consider whether a particular plaintiff should have known that the condition was hazardous, but whether a reasonable person in that position would have foreseen the danger. *Id*.

If there are special aspects that make an open and obvious condition unreasonably dangerous, then the possessor of the premises retains the duty to undertake reasonable precautions to protect invitees from that danger. *Mann v Shusteric Enterprises*, 470 Mich 320, 328-329, 331; 683 NW2d 573 (2004). In determining whether a condition presents a special aspect, a court must consider whether the open and obvious condition is effectively unavoidable or presents a high risk of sever harm. *Lugo*, 464 Mich at 518. This determination must be based on the nature of the condition at issue, and not on the degree of care used by the invitee. *Id*. at 523-524. The *Lugo* Court provided two examples of situations that might involve special aspects and present an unreasonable risk of harm despite their open and obvious character: a commercial building with only one exit for the general public in which the floor is covered with standing water, and an unguarded 30-foot-deep pit in the middle of a parking lot. *Id*. at 518.

Plaintiff concedes that if he had been looking where he was walking he would have seen and avoided the cantaloupe-sized rock in defendant's front yard. He was walking backward without looking because he heard what he thought was a large dog on a chain, but he never actually saw the dog. Plaintiff argues that the dog was not open and obvious because he could not observe the dog's exact location or its size. However, the dog, or at least the sound of the dog's chain, was an open and obvious danger. Plaintiff perceived the danger when he heard the chain coming from the carport and that is why he reacted by backing away. The danger the dog posed was discoverable upon casual inspection. The fact that plaintiff then fell over another open and obvious danger does not negate the classification of both dangers as open and obvious. There is no evidence that the rock was not open and obvious. Based on plaintiff's description,

this was a large rock that was clearly visible on a sunny day, which he would have seen if he had been looking. Tripping over the rock is analogous to the plaintiff in *Lugo* falling after stepping in a pothole. The plaintiff in *Lugo* would have seen the pothole had she been looking, just as plaintiff here acknowledged he would have seen the rock had he looked. *Lugo*, 464 Mich at 514-515. We conclude that because the dangers posed by the dog and rock were discoverable upon casual inspection, there was no genuine issue of material fact regarding whether they were open and obvious in nature.

Next, plaintiff argues that the condition on the property possessed special aspects making it unreasonably dangerous. He contends that falling over the rock was effectively unavoidable. He asserts that, based on his training and experience, he knew to never turn his back on a dog, and that when confronted with the possibility of a dog attack, he backed away in the only possible manner to safely exit the property. He contends that his attempt to safely escape from the dog left him in a position where stepping onto the rock was unavoidable.

Although plaintiff has alleged that he was acting in response to the large dog, he has not shown how the rock was effectively unavoidable. Nothing prevented plaintiff from glancing backward while still backing away from the dog or from checking his path before backing off the property. There was no evidence to establish that traveling over the rock was the only safe way for plaintiff to exit the property. Even assuming that plaintiff had no other option but to walk backward because of the chained dog, the large rock simply did not pose an unreasonable risk of harm. Nor can we conclude that the chained dog presented the type of "unusual" distraction that would have relieved plaintiff of his obligation to watch where he was walking. *Kennedy*, 274 Mich App at 717-718; see also *Lugo*, 464 Mich at 522.

The trial court correctly ruled that plaintiff's premises liability claim was barred by the open and obvious danger doctrine.

Affirmed.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood