

STATE OF MICHIGAN
COURT OF APPEALS

JULIAN ROMANOWSKI,

Plaintiff-Appellant,

v

CLASSY CHASSIS, INC.,

Defendant-Appellee.

UNPUBLISHED

March 2, 2010

No. 290382

Wayne Circuit Court

LC No. 08-109417-NO

Before: Fitzgerald, P.J., and Cavanagh and Davis, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

We review a trial court's summary disposition decision de novo. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 424; 751 NW2d 8 (2008). Although the trial court did not identify the particular subrule of MCR 2.116(C) on which it relied to grant defendant's motion, review under MCR 2.116(C)(10) is appropriate because defendant moved for summary disposition under that subrule and the trial court relied on documentary evidence in granting the motion. *Healing Place at North Oakland Medical Ctr v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* Summary disposition should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 56. "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison*, 481 Mich at 425.

The open and obvious doctrine is an integral part of a premises possessor's duty owed to an invitee in a common-law negligence case. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001); see also *Allison*, 481 Mich at 425 n 2. In general, the premises possessor has no duty to protect an invitee from an open and obvious danger unless special aspects of the risk make it unreasonably dangerous. *Lugo*, 464 Mich at 517. A danger is open and obvious where "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 Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). An objective test is used to

determine whether a reasonable person in the plaintiff's position would have foreseen the danger. *Kennedy*, 274 Mich App at 713.

In this case, contrary to what plaintiff argues, the evidence does not support a reasonable inference, let alone an undisputed fact, that the depression by the sewer drain in the parking lot where plaintiff fell would not have been visible, on casual inspection, to a person approaching it from plaintiff's direction. Although plaintiff denied that he would have seen the depression had he looked down, the photograph of the depression taken by plaintiff after he fell reflects no impediment to the discovery of the condition upon casual inspection from any direction. Rather, it is clear from plaintiff's deposition testimony that he did not see the condition because he was looking at his car. Plaintiff testified that he was in the process of drying his car when he fell. He further testified, "[a]s I walked around the back of the car, *I'm looking at my car*, I took that fatal step, hit that depression" (emphasis added). Plaintiff admitted, however, that he saw the depression after he stood up and turned around.

Viewed in a light most favorable to plaintiff, plaintiff's deposition testimony, evaluated in light of the photographic evidence and other proofs presented to the trial court, failed to create a genuine issue of material fact. Reasonable minds could not differ in concluding that an average user of ordinary intelligence would have been able to discover the condition and risk presented by the depression near the sewer drain. Further, plaintiff failed to show any special aspects of the condition that would give rise to a duty. Therefore, the trial court did not err in granting defendant's motion for summary disposition.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Mark J. Cavanagh
/s/ Alton T. Davis