STATE OF MICHIGAN

COURT OF APPEALS

THOMAS GATZA,

Plaintiff-Appellant,

v

DELEHANTY FORD,

Defendant-Appellee.

UNPUBLISHED
May 20, 2021

No. 353199
Genesee Circuit Court
LC No. 2019-112775-NI

Before: SAWYER, P.J., and STEPHENS and RICK, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right the trial court's order granting summary disposition under MCR 2.116(C)(10) in favor of defendant. We affirm.

I. BACKGROUND

This case arises out of a fall that occurred at defendant's car dealership. Plaintiff came to the dealership on a Sunday while no employees were present. Plaintiff was walking across the display lot when he stepped into what has been described as either a small pothole or an "alligatored" segment of the pavement and twisted his ankle. Plaintiff suffered multiple fractures. Plaintiff filed a premises liability action, and the trial court granted summary disposition under MCR 2.116(C)(10) in favor of defendant based upon a lack of duty.

The essential facts of this case are largely undisputed. Plaintiff drove onto defendant's dealership lot on a Sunday. The parties agree he was an invitee not a trespasser despite the fact that the dealership was closed at the time. Plaintiff exited his car to view a truck that the dealership had on display for sale. Noticing another vehicle he found attractive, plaintiff traversed the lot toward that truck with his gaze fixated on the truck. He encountered a portion of the parking-lot pavement characterized as either a small pothole or as a portion of the pavement with cracking and fracturing. Once he stepped into or onto that portion of the pavement, he stumbled and suffered multiple fractures. While he did not see the portion of the pavement asserted to be defective at the time he was injured, upon his return to the lot the next day, he was able to locate it. In deposition plaintiff testified:

A. The next day I went back to review the site and they were -- there's clearly defined defects throughout the entire site.

Q. How did you locate those defects the next day?

A. Well, at first I drove to where my incident happened, and I looked at that, and then I started looking to the pavement right in that proximity within 20, 30 feet, noticed that they've got major problems, deeper holes.

In May 2019, plaintiff filed a complaint against defendant in the trial court asserting a negligence claim. Defendant filed a motion for summary disposition under MCR 2.116(C)(10), asserting a lack of duty due to the open and obvious nature of the defect that occasioned plaintiff's injury. Plaintiff both denied that the defect was open and obvious and also argued that the doctrine was inapplicable to this case. The trial court granted summary relief, articulated the reasons on the record, and memorialized the ruling in a written order.

II. DISCUSSION

Plaintiff argues that summary disposition was inappropriately granted because a genuine issue of material facts exists regarding whether the pothole that caused his injury was open and obvious. We disagree.

A. STANDARD OF REVIEW

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

> A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. 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. [*Zaher v Miotke*, 300 Mich App 132, 139-140; 832 NW2d 266 (2013) (quotations marks and citations omitted).]

"[T]his Court's review is limited to review of the evidence properly presented to the trial court." *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 380; 775 NW2d 618 (2009). "This Court is liberal in finding genuine issues of material fact." *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008).

B. ANALYSIS

To establish premises liability, plaintiff must establish the elements of negligence. *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 693; 822 NW2d 254 (2012). Negligence

requires proof of the following elements: "(1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Id*. (quotation marks and citation omitted). "Generally, an owner of land 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." *Id*. (quotation marks and citation omitted). A defendant is liable "for a breach of this duty of ordinary care when the premises possessor knows or should know of a dangerous condition on the premises of which the invitee is unaware and fails to fix the defect, guard against the defect, or warn the invitee of the defect." *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012). However, a "possessor of land owes no duty to protect or warn of dangers that are open and obvious because such dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid." *Id*. at 460-461 (quotation marks and citation omitted).

Whether a safety hazard's existence is "open and obvious" is an objective question that "depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Id*. at 461. "[I]t is important for courts in deciding summary disposition motions by premises possessors in 'open and obvious' cases to focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 523-524; 629 NW2d 384 (2001).

The hazard on defendant's property was open and obvious. Plaintiff stepped in a defect in defendant's lot that he describes as a "pothole," while his brief on appeal describes it as "alligatored" pavement. We are aware that "potholes in pavement are an 'everyday occurrence' that ordinarily should be observed by a reasonably prudent person." *Lugo*, 464 Mich at 520. There are, of course, circumstances when a pothole, especially one as small as the pavement variation in this case, while an ordinary phenomenon, is not readily observable upon casual observation. However, in this instance plaintiff admits that he was focused on a truck. A photograph of the area of plaintiff's fall, which was presented to the trial court in support of summary disposition, allows a view of the pothole. Plaintiff's testimony provides no support for the assertion that trucks or any other phenomenon obscure the area. Therefore, there is no genuine issue of material fact regarding whether the pothole was open and obvious.

Plaintiff additionally argues that defendant's car lot was a store rather than a parking lot, making this a shopkeeper-liability case, and that, therefore, the open and obvious doctrine does not apply. We note that unlike the interior showroom of the dealership, the parking lot display is substantially dissimilar to a self-service store. Moreover, we are bound to follow the holding in *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 717; 737 NW2d 179 (2014), that the open and obvious doctrine *does* apply in cases in which a shopkeeper failed to maintain reasonably safe aisleways.

Affirmed.

/s/ David H. Sawyer
/s/ Cynthia Diane Stephens
/s/ Michelle M. Rick