

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ROBERT PERRY,

Plaintiff-Appellant,

v

BEACON HILL, INC.,  
d/b/a BEACON HILL APARTMENTS,

Defendant-Appellee.

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UNPUBLISHED

July 16, 1999

No. 207764

Oakland Circuit Court

LC No. 96-518380 NO

Before: Gage, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant in this slip and fall action. We affirm.

Plaintiff, a tenant of defendant's apartment complex, testified that he injured himself when he stepped in a pothole while jogging on defendant's premises. Plaintiff testified that he jogged the same route numerous times before his injury. Plaintiff further testified that by his estimation the hole was ten inches in diameter. The wife and a friend both testified that the hole was visible upon inspection, though neither witness observed plaintiff's fall. Defendant moved for summary disposition under MCR 2.116(C)(10) on the basis that the pothole was open and obvious and that its duty to keep its premises in a reasonably safe condition did not extend to such open and obvious dangers. Plaintiff responded that the pothole was hidden, but that even if it was open and obvious, defendant was not relieved of its duty to protect plaintiff from this unreasonably dangerous condition. The trial court found that plaintiff slipped in an open and obvious pothole and granted defendant's motion for summary disposition.

We review an order granting summary disposition de novo. *Century Surety Co v Charron*, 230 Mich App 79, 82; 583 NW2d 486 (1998). A motion for summary disposition may be granted pursuant to MCR 2.116(C)(10) when, except with regard to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Giving the benefit of reasonable doubt to the nonmovant, this Court must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Mahaffey v Attorney General*, 222 Mich App 325, 340; 564 NW2d 104 (1997).

Plaintiff raises three issues on appeal. First, plaintiff contends that the trial court erred when it concluded that the pothole was an open and obvious danger. We disagree. A landowner has a duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition that the owner knows or should know the invitees will not discover or protect themselves against. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995); *Butler v Ramco-Gershenson, Inc*, 214 Mich App 521, 532; 542 NW2d 912 (1995). Whether a duty exists in a negligence action is a question of law for the court to decide. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995).

An invitee enters the land on an invitation that carries with it an implication that the invitor has taken reasonable care to prepare the premises and make them safe. *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 9-10; 574 NW2d 691 (1997). While an invitor has a duty to warn of hidden defects, there is generally no duty to warn of “open and obvious” dangers. *Id.* at 10. Whether a danger is open and obvious depends upon whether it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection.” *Id.* However, even if the danger is open and obvious, an invitor may still have a duty to protect invitees against foreseeably dangerous conditions. *Id.* Thus, as our Supreme Court stated in *Bertrand, supra*, at 611, “if the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor is required to undertake reasonable precautions.”

In the present case, the trial court was required to use an objective standard to determine whether the pothole was an open and obvious danger. Thus, the issue before the court was whether a reasonable person in plaintiff’s position would foresee the danger. *Hughes, supra*, at 11. Two witnesses testified that the pothole was readily observable upon inspection. In addition, the photographs submitted by both parties to the court support the trial court’s finding that plaintiff slipped in an open and obvious pothole. Accordingly, we conclude that the trial court did not err in determining that the pothole constituted an open and obvious danger.

In his two remaining issues on appeal, plaintiff contends that defendant was not relieved of its duty to protect him from the risk of harm presented by the pothole because the risk of harm was unreasonable due to the unusual character and location of the pothole. We disagree. While an invitor has a duty to protect an invitee against foreseeably dangerous conditions even if the invitor’s duty to warn is obviated by the open and obvious nature of the conditions, we find nothing unusual about the pothole’s character, location, or surrounding conditions which required defendant to take reasonable precautions to protect plaintiff from the risk of harm presented by the pothole. See *Bertrand, supra*, at 611, 616-617.

Plaintiff testified that the pothole posed an unusual danger because it was not readily visible to him as he jogged, and contends that the character of the curb was unusual because it contained a pothole rather than an even and level seam from the sidewalk to the pavement. However, plaintiff testified that he was aware that the area was in a state of disrepair from ongoing construction activities and that he could not recall where he was looking when he stepped into the pothole. Giving the benefit of reasonable doubt to plaintiff, we nonetheless conclude that there was nothing unusual about the pothole which created an unreasonable risk of harm. If a particular condition creates a risk of harm only

because the invitee does not discover the condition or realize the danger, then the open and obvious doctrine will cut off the invitor's liability if the invitee should have discovered the condition and realized its danger. *Id.* at 610-611. Furthermore, a defendant is under no duty to prevent careless persons from hurting themselves. *Id.* at 615. Accordingly, we conclude that defendant owed no duty to protect plaintiff from the risk of harm posed by the pothole and hold that the trial court properly granted defendant's motion for summary disposition.

Affirmed.

/s/ Hilda R. Gage

/s/ Michael R. Smolenski

/s/ Brian K. Zahra