

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH LINDSAY,

Plaintiff-Appellant,

v

KLRF MANAGEMENT, SOUTH MONROE
PLAZA and MONROE MANAGEMENT
COMPANY,

Defendants-Appellees.

UNPUBLISHED
October 15, 1999

No. 211701
Monroe Circuit Court
LC No. 97-006912 NO

Before: Neff, P.J., and Murphy and J. B. Sullivan*, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right an order granting summary disposition in favor of defendants. We affirm.

Plaintiff contends that the trial court erred when it granted summary disposition pursuant to MCR 2.116(C)(10) because defendants should have known that an unreasonable risk of harm existed in a sidewalk with broken concrete and an exposed pipe. Further, defendants failed to exercise reasonable care to make the condition safe. We disagree.

A trial court's grant of summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* A court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence available to it. *Id.* If the party opposing the motion fails to present evidentiary proofs creating a genuine issue of material fact, summary disposition is properly granted. *Smith v Globe Life Ins Co*, 460 Mich 446, 455 & n 2; 597 NW2d 28 (1999).

In a negligence action, summary disposition is proper if, as a matter of law, the defendant owed no duty to the plaintiff under the alleged facts. *Eason v Coggins Memorial Christian*

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Methodist Episcopal Church, 210 Mich App 261, 263; 532 NW2d 882 (1995). Ordinarily, questions regarding duty are for the court to decide as a matter of law. *Mason v Royal Dequindre, Inc.*, 455 Mich 391, 397; 566 NW2d 199 (1997).

A possessor of land owes no duty regarding open and obvious dangers. *Millikin v Walton Manor Mobile Home Park, Inc.*, 234 Mich App 490, 495-497; 595 NW2d 152 (1999); *White v Badalamenti*, 200 Mich App 434, 437; 505 NW2d 8 (1993). A condition is open and obvious if an average user with ordinary intelligence would have discovered the danger and risk presented upon a casual inspection. *Hughes v PMG Building, Inc.*, 227 Mich App 1, 10; 574 NW2d 691 (1997). However, even if a danger is open and obvious, a possessor of land may still have a duty to protect invitees against foreseeably dangerous conditions:

[T]he rule generated is that if the particular activity or condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger. On the other hand, 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. The issue then becomes the standard of care and is for the jury to decide. [*Id.*, quoting *Bertrand v Alan Ford, Inc.*, 449 Mich 606, 611; 537 NW2d 185 (1995).]

Thus, if there are genuine issues of fact regarding an unreasonable risk of harm, then duty and breach are jury questions, and summary disposition is improper. *Millikin, supra* at 498-499.

Here, the open and obvious doctrine cuts off defendants' liability. The broken concrete in the sidewalk, with the exposed drainpipe, was not hidden. Rather, it was easily observable upon casual inspection by any average person walking near it. Plaintiff was not watching where he was walking. Had plaintiff glanced down at the path in which he was walking, he would have noticed the pipe and the break in the concrete.

Because the condition was open and obvious, the relevant inquiry is whether the risk of harm remained unreasonable even though it was obvious. In the instant case, the condition of the sidewalk did not present a foreseeably dangerous condition because it could have been easily avoided. The broken sidewalk with the pipe was not in a location where individuals were forced to walk. The affidavit of the manager of defendants KLR Management and Monroe Management Company established that no other injuries were reported at the shopping plaza as a result of the condition of the sidewalk before or after plaintiff fell. The condition of the sidewalk did not present an unreasonable risk because it was not foreseeable that someone would not be able to easily avoid the pipe. Accordingly, the open and obvious doctrine negates any duty that defendants owed to plaintiff regarding the condition of the sidewalk.

Plaintiff also argues that the trial court erred when it granted defendants' motion for summary disposition where comparative negligence does not bar his recovery. As discussed

above, defendants owed plaintiff no duty with regard to the sidewalk and exposed pipe. Thus, plaintiff's comparative negligence is irrelevant.

Affirmed.

/s/ Janet T. Neff

/s/ William B. Murphy

/s/ Joseph B. Sullivan