

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

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DONALD MCCOLE and DEBRA MCCOLE,  
Plaintiffs-Appellants,

UNPUBLISHED  
April 28, 2011

v

No. 294362  
Ingham Circuit Court  
LC No. 07-001065-NO

INDUSTRIAL FINISHING TECHNOLOGIES,  
INC., STEVEN MAURER, DETROIT  
INDUSTRIAL SYSTEMS, INC., and  
INDUSTRIAL COATING EQUIPMENT, INC.,

Defendants,

and

DEMMER CORPORATION,

Defendant-Appellee.

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Before: SHAPIRO, P.J., and HOEKSTRA and TALBOT, JJ.

PER CURIAM.

In this premises liability case, plaintiffs appeal as of right the trial court's order granting summary disposition under MCR 2.116(C)(10) to defendant Demmer Corporation (Demmer). Because we conclude that there were no special aspects to the open and obvious dangers related to the unloading of the aluminum oven doors, we affirm.

**I. BASIC FACTS**

Plaintiff Donald McCole<sup>1</sup> delivered aluminum oven panels on a flatbed truck to Demmer's facility in Lansing.<sup>2</sup> The two men assigned to unload the oven panels<sup>3</sup> from the truck

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<sup>1</sup> References to "plaintiff" in the singular in this opinion refer to Donald McCole. The claims of Debra McCole are derivative to those asserted by her husband.

<sup>2</sup> Demmer received a contract from the federal government to manufacture and refinish doors for the military's Humvees. Demmer contracted with Industrial Finish Technologies (IFT) to install

told plaintiff that they would unload the panels on the driver's side of the truck. Plaintiff then asked the men if he was "okay" to stay on the passenger's side to roll up the straps and tarps. The two men replied that if plaintiff stayed on the passenger's side he would be out of their way.

The oven panels were double stacked in a "T" formation on the truck bed. There were two rows of oven panels near the front of the truck, with a single row of oven panels down the back of the truck bed. The two men first unloaded the single row of oven panels. When they tried to unload a bundle of oven panels from the double stacks, a bundle fell off the truck bed on the passenger side and hit plaintiff. Plaintiff suffered multiple injuries, including an L3-L4 spinal fracture, causing paraplegia to the lower extremities. The incident occurred approximately 20 minutes after the two men began unloading the oven panels.

Demmer responded to plaintiffs' complaint by filing a motion for summary disposition under MCR 2.116(C)(10). The motion was based on the common work area doctrine. In their response, plaintiffs argued that their claim against Demmer was one for premises liability. Demmer addressed premises liability in its reply brief, and the trial court decided the motion in that legal context. The trial court granted summary disposition to Demmer. It concluded that Demmer owed no duty to plaintiff because, under the circumstances, Demmer did not know, nor should have known, of the dangerous condition.

## II. STANDARD OF REVIEW

We review *de novo* a trial court's decision on a motion for summary disposition. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Summary disposition is proper under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." We must consider the pleadings, affidavits, depositions, admissions and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

## III. ANALYSIS

On appeal, plaintiffs argue that the trial court erred in granting summary disposition to Demmer because genuine issues of material fact exist regarding whether Demmer had constructive notice of the dangerous condition and whether there were special aspects to the dangerous condition. While we agree that there may be a factual dispute whether Demmer had constructive notice of the dangerous condition, we disagree that there were any special aspects to the dangerous condition.

### A. CONSTRUCTIVE NOTICE

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a paint finishing station in Demmer's facility. IFT worked with Industrial Coating Equipment (ICE) to build the finishing station. IFT/ICE contracted with Detroit Industrial Services (DIS) to build a conveyor system for the paint finishing station. The aluminum oven doors delivered by plaintiff were to be used by DIS in the building of the conveyor system.

<sup>3</sup> The two men were employees of DIS.

Demmer does not dispute that plaintiff was an invitee to its premises. A premises possessor owes a duty to its invitees to exercise reasonable care to protect them from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, an invitor’s duty only arises when the invitor has actual or constructive notice of the dangerous condition. *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001). Plaintiffs do not argue that Demmer had actual notice of the dangerous condition; they only contend that Demmer had constructive notice. “Constructive notice may arise not only from the passage of time itself, but also from the type of condition involved, or from a combination of the two elements.” *Banks v Exxon Mobil Corp*, 477 Mich 983, 983; 725 NW2d 455 (2007). The determination whether a defendant had constructive notice of a dangerous condition is generally a question of fact. *Id.* at 984.

According to plaintiffs, the dangerous condition that existed on Demmer’s property was the “dangerous unloading process,” where the “unstrapped, unstable” aluminum oven doors were being unloaded from the flatbed truck when plaintiff was in close proximity to the truck. Initially, we question whether plaintiffs’ claim against Demmer actually sounds in premises liability. An action sounds in premises liability when the injury results from a condition of the land. *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001). Here, the dangerous condition alleged by plaintiffs—the dangerous unloading of the flatbed truck—is not a condition of Demmer’s property; rather, it is an activity that occurred on the property. Although Demmer argued below that plaintiffs’ claim did not sound in premises liability, it does not raise the argument on appeal. Accordingly, we need not, and do not, decide the issue whether plaintiffs’ claim against Demmer involves Demmer’s duties as a premises possessor.

Upon reviewing the submitted documentary evidence, we believe there may be a question of fact whether Demmer had constructive notice of the “dangerous unloading process.” At least two of Demmer’s employees knew that plaintiff had arrived in the flatbed truck and that the truck was loaded with aluminum oven panels. The truck was being unloaded for approximately 20 minutes before plaintiff was injured. In addition, several of defendant’s approximately 150 employees who were at the facility were working in or around the docking station where the truck was being unloaded. Ultimately, we need not decide whether there is a factual issue whether Demmer had constructive notice because, as discussed below, we conclude there were no special aspects to the open and obvious dangers of unloading the truck.

## B. SPECIAL ASPECTS

The duty an invitor owes to its invitees to exercise reasonable care to protect them from unreasonable risks of harm caused by dangerous conditions does not extend to dangers that are open and obvious. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 328; 683 NW2d 573 (2004); *Lugo*, 464 Mich at 516-517. However, “if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk.” *Lugo*, 464 Mich at 517. An objective standard must be utilized to determine whether a condition is open and obvious and whether special aspects render an open and obvious condition unreasonably dangerous. *Mann*, 470 Mich at 329.

Plaintiffs claim that the present case is similar to the facts of *Jimkoski v Shupe*, 282 Mich App 1; 763 NW2d 1 (2008), wherein this Court affirmed the trial court's holding that a genuine issue of material fact existed regarding whether a hanging bale of straw created a special aspect that rendered an open and obvious condition unreasonably dangerous. Thus, plaintiffs do not argue that the unloading of the aluminum oven doors from the flatbed truck did not present open and obvious dangers. Rather, they claim that the unloading process presented special aspects because there was a uniquely high likelihood of harm if the unsecured aluminum oven doors fell off the truck bed.

In *Jimkoski*, the defendant was a farmer who sold bales of straw. The defendant stored the bales, each of which weighed approximately 700 pounds, in stacks. The top bales were approximately 11 feet off the ground. The plaintiff's father ordered some bales, and the defendant used a tractor to transfer the bales from the stacks to the plaintiff's father's wagon. Near the end of the loading process, the defendant encountered a problem. He attempted to grab a three-bale group from the top of the stack, but only the two lower bales moved. The third bale, at the very top of the stack, remained frozen in place. The defendant tried to dislodge the bale with the tractor, but it would not move. The defendant and the plaintiff's father then proceeded to secure the bales that had been loaded on the wagon. At some point, the frozen bale fell and hit the plaintiff's father. In agreeing that a factual dispute existed whether the hanging bale presented special aspects, the Court stated:

The straw bale that killed plaintiff[']s father] was extremely heavy and hanging high in the air in a position where, if it became dislodged, it would fall with sufficient speed to cause significant damage. Defendant admitted that, having unsuccessfully attempted to dislodge the bale, he believed that it would not continue to hang suspended that way indefinitely. Given the inevitability of the bale's collapse, its height, and its weight, the fact-finder could reasonably have concluded that it constituted a special aspect because of the "severity of harm" it could foreseeably cause if not avoided. [*Jimkoski*, 282 Mich App at 6.]

The Court also stated that the evidence indicated that after the bales were secured to the wagon, the plaintiff's father and the defendant went to a corner behind the remaining bales to get out of the wind. According to the Court, a fact-finder could reasonably conclude that because the hanging bale presented a danger in an area where the plaintiff's father might likely seek relief from the weather, the bale presented a high likelihood of harm despite the bale being an open and obvious danger. *Id.* at 6-7.

We conclude that, unlike the frozen straw bale in *Jimkoski*, there are no special aspects to the aluminum oven panels that rendered the unloading of the oven panels, which was an open and obvious danger, unreasonably dangerous. Admittedly, like the frozen straw bale, the aluminum oven panels that injured plaintiff were extremely heavy and stacked several feet in the air. If they became dislodged and fell from the bed of the truck, they would cause significant damage. However, plaintiffs have presented no evidence to suggest that the collapse of the oven panels from the truck bed to the floor was inevitable. Plaintiffs claim that the oven panels were "unstrapped" and "unstable" on the truck bed. While the evidence establishes that the oven panels were not strapped to the truck bed, plaintiffs cite no evidence that the oven panels were "unstable" atop the truck bed. In addition, the evidence shows that plaintiff positioned himself

near the truck when it was being unloaded in order to roll up the straps and tarps. Not the weather, nor any other condition forced plaintiff to stand near the truck.

Unloading heavy material from a truck bed presents dangerous risks, but those risks are open and obvious. In this case, there were no special aspects to the aluminum oven doors that rendered the open and obvious dangers attendant to the unloading of the oven doors unreasonably dangerous. Because Demmer had no duty to protect plaintiff from open and obvious dangers, we affirm the trial court's order granting summary disposition to Demmer.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Michael J. Talbot