STATE OF MICHIGAN

COURT OF APPEALS

ELEANOR L. GALLOWAY,

Plaintiff-Appellant,

v

EMRO MARKETING COMPANY, d/b/a UNITED,

Defendant-Appellee.

UNPUBLISHED
December 14, 1999

No. 212335
Branch Circuit Court
LC No. 97-04239 NO

Before: Hood, P.J., and Holbrook, Jr., and Fitzgerald, JJ.

MEMORANDUM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand.

Plaintiff was injured when she fell at defendant's gas station after she had refueled her automobile. Plaintiff had just finished replacing the fuel cap, when she stepped back and tripped in a depression in the seam joining the concrete and asphalt sections of the ground around the gas pumps. Plaintiff admitted to being a regular customer of the station.

The sole issue in this case is whether the trial court erred when it granted defendant's motion for summary disposition on the basis that the defect was open and obvious and did not create an unreasonable risk of harm. "This Court reviews decisions on motions for summary disposition de novo." *Auto Club Ins Ass'n v Sarate*, 236 Mich App 432, 434; ___ NW2d ___ (1999).

> A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to damages as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).]

"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." *Hughes v PMG Building, Inc*, 227 Mich App 1, 10; 574 NW2d 691 (1997). Generally, a landowner has no duty to warn invitees of dangers that are open and obvious. *Id.* However, "if the risk of harm remains unreasonable, despite its obviousness . . . , then the circumstances may be such that the invitor is required to undertake reasonable precautions." *Bertrand v Alan Ford Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995).

After reviewing the pertinent portions of the record, we conclude that the grant of summary disposition was improper. We believe that under the circumstances of this case, defendant is not entitled to a judgment as a matter of law because of the existence of genuine issues of material fact.

Reversed and remanded. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Donald E. Holbrook, Jr.
/s/ E. Thomas Fitzgerald