

STATE OF MICHIGAN  
COURT OF APPEALS

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DANA MYERS,

Plaintiff-Appellant,

v

MCLAREN REGIONAL MEDICAL CENTER,

Defendant-Appellee.

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UNPUBLISHED

March 3, 2000

No. 208264

Genesee Circuit Court

LC No. 96-045388 NO

Before: Kelly, P.J., and Jansen and White, JJ.

KELLY, J. (dissenting).

I respectfully dissent.

I believe it is a question of fact whether the condition of the uneven pavement was open and obvious under the lighting conditions alleged by plaintiff. This was a motion for summary disposition, plaintiff alleged it was dark. An open and obvious condition is one that is visible and well known or can be seen and appreciated. *Glittenberg v Doughboy Ind, Inc.*, 436 Mich 673, 695; 462 NW2d 348 (1990). The parties do not dispute that plaintiff was an invitee on defendant's premises. The invitor owes a duty to "exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land, that the invitor is aware of or should be aware of. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995).

The majority says that although plaintiff testified at her deposition that it was well after sundown when she fell and that the area was dimly lit, plaintiff was required to "establish that poor lighting prevented her from seeing the uneven pavement." It seems to me that is a classic invasion of the responsibility of the trier of fact. *Id.* at 611; *Riddle v McLouth Steel Products*, 440 Mich 85,96; 485 NW2d 676 (1992). It is not incumbent upon plaintiff to establish anything to defeat summary disposition except that there is factual support for her claim. *Spiek v Michigan Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). It is up to the jury or trier

of fact to determine the sufficiency of her evidence not the trial court on motion for summary disposition.

I would reverse.

/s/ Michael J. Kelly