STATE OF MICHIGAN

COURT OF APPEALS

JANET WEBER,

Plaintiff-Appellant,

v

PARAGON OF MICHIGAN, INC., d/b/a MOUNTAIN JACKS, and TOYS R US, INC.,

Defendants-Appellees.

UNPUBLISHED
May 2, 2000

No. 205932
Eaton Circuit Court
LC No. 96-000532 NO

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

PER CURIAM.

In this premises liability action, plaintiff appeals as of right from an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse.

We review a trial court's decision on a motion for summary disposition de novo. *Arias v Talon Development Group, Inc.*,239 Mich App 265, 266; ___NW2 ___ (2000); *Power Press v MSI Battle Creek Stamping*, 238 Mich App 173, 177; 604 NW2d 722 (1999). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Arias, supra.* The motion may be granted 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. *Arias, supra; Ireland v Edwards*, 230 Mich App 607, 613; 584 NW2d 632 (1998). In reviewing the trial court's decision, we must consider the affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, and, giving the benefit of the doubt to the non-moving party, we must determine whether a genuine issue of material fact exists to warrant a trial. *Power Press, supra.*

Possessors of land have a legal duty to exercise reasonable care to protect their invitees from dangerous conditions on the land. *Abke v Vandenberg*, 239 Mich App 359, 361; ___ NW2d ___ (2000), citing *Bertrand v Alan Ford, Inc.*, 449 Mich 606, 609; 537 NW2d 185 (1995). If a condition is open and obvious, however, this duty does not apply unless the condition poses an

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

unreasonable risk of harm. *Abke, supra,* citing *Millikin v Walton Manor Mobile Home Park, Inc,* 234 Mich App 490, 498-499; 505 NW2d 152 (1999), and 2 Restatement Torts, 2d, § 343A, p 218. The test for an open an obvious danger is whether an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. *Abke, supra,* citing *Novotney v Burger King Corp (On Remand),* 198 Mich App 470, 474-475; 499 NW2d 379 (1993).

Plaintiff has alleged in her complaint and in her answers to interrogatories that she was injured in a fall that was caused by a "sharp decline in elevation and/or a wet and slippery condition" on the surface of the defendants' parking lot, and that she was unaware of this "low area or depression" at the time because "it was hidden by water and poor lighting." Although defendants dispute these allegations, the record is devoid of any evidence to the contrary. See *Arias, supra,* 268-269.

Moreover, none of the evidence offered in support of the motion for summary disposition, when viewed in the light most favorable to plaintiff, suggests that an average user of ordinary intelligence could have discovered the alleged depression or decline upon casual inspection of the surface of the parking lot under those circumstances. The sole photograph of the parking lot submitted with the summary disposition motion appears to have been taken in the daytime while the surface of the parking lot was dry, and therefore the photograph provides no basis for determining whether the alleged depression or decline could have been observed under the standing water and the lighting conditions that existed on the evening when plaintiff's injury occurred. In her deposition, plaintiff merely indicated that she was aware of the standing water, not the depression or decline in elevation in the underlying surface. Plaintiff's admission that she did not trip or stumble "over" anything may be viewed as entirely consistent with her claim that she lost her balance when she encountered a hidden "low area" or "decline" in the surface of the lot, as opposed to some sort of obstacle protruding upward from the surface of the lot. Similarly, plaintiff's testimony that she "lost her balance" while attempting to step around a puddle may be viewed as consistent with her claim that her fall was caused by a "sharp decline in elevation and/or a wet and slippery condition" on the surface of the lot. In short, whether the area was dark enough to prevent adequate visibility and whether, even assuming the condition was open and obvious, the condition was unreasonably dangerous are both questions of fact. That plaintiff had been to the parking lot many times before and was familiar with its layout is not relevant to the issue of whether the alleged hazard was open and obvious to the average user upon casual inspection. *Novotney supra,* at 475.

Viewing the evidence in the light most favorable to plaintiff, summary disposition is inappropriate. *Arias, supra; White v Badalamenti,* 200 Mich App 434, 437; 505 NW2d 8 (1993).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ William B. Murphy
/s/ Joseph B. Sullivan