

STATE OF MICHIGAN
COURT OF APPEALS

DIANNE E. MILLER,

Plaintiff-Appellant,

UNPUBLISHED
January 23, 2001

v

JAMES ESSHAKI, d/b/a ESSCO
DEVELOPMENT COMPANY,

No. 218170
Oakland Circuit Court
LC No. 98-005541-NO

Defendant-Appellee.

Before: Saad, P.J., and Griffin and R. B. Burns*, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

On the sunny morning of May 27, 1995, plaintiff went to Aco Hardware to return some merchandise. Aco Hardware was a tenant of defendant, who does business as Essco Development Company. As plaintiff and her sister were walking out of the parking lot, onto a handicapped ramp that led to the store, plaintiff tripped and fell. Plaintiff does not recall what she was doing as she walked toward the ramp or whether she looked down before she stepped on the ramp. After she fell, plaintiff turned and faced the area where she had fallen and saw the "hole" that she believed had caused the fall. Plaintiff was seriously injured by the fall.

Plaintiff filed suit to recover for her personal injuries under a negligence theory. Defendant subsequently filed a motion for summary disposition pursuant to MCR 2.116(C)(10), which was granted by the trial court. The trial court concluded that there was no evidence to establish that the condition of the area of the fall was unreasonably dangerous. Instead, the evidence indicated that plaintiff did not discover the condition of the sidewalk because she was not looking.

On appeal, plaintiff contends that the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(10) for defendant because there existed a question of fact regarding whether the condition that caused plaintiff's fall was open and obvious and whether it presented an unreasonable risk of harm. We disagree. This Court reviews a trial court's grant or denial of a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337;

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

572 NW2d 201 (1998). A motion for summary disposition may be granted when, except as to the amount of damages, 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. MCR 2.116(C)(10). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek, supra*. This Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

As a business invitor, defendant owed plaintiff, an invitee, a duty of care. Defendant does not dispute his status as an invitor or plaintiff's status as an invitee. An invitor has a duty of care, not only to warn the invitee of any known dangers, but to make the premises safe, which requires the invitor to inspect the premises and, depending on the circumstances, make any necessary repairs or warn of any discovered hazards. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000). An invitor is subject to liability for physical harm caused to his invitees by a condition on the land if the invitor

(a) knows of, or by the exercise of reasonable care would discover, the condition and should realize that the condition involves an unreasonable risk of harm to such invitees; (b) should expect that invitees will not discover or realize the danger, or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect invitees against the danger. [*Id.*]

An invitor's duty of care owed to an invitee does not extend to conditions from which an unreasonable risk cannot be anticipated or to dangers so obvious that an invitee can be expected to discover them himself. *Weakley v Dearborn Heights*, 240 Mich App 382, 385; 612 NW2d 428 (2000). An invitor must warn of hidden defects, but is not required to eliminate or warn of open and obvious dangers unless the invitor should anticipate harm despite the invitee's knowledge of it. *Riddle v McLouth Steel Products*, 440 Mich 85, 90-95; 485 NW2d 676 (1992). A danger is open and obvious when it is reasonable to expect an average person with ordinary intelligence to discover the danger upon casual inspection. *Weakley, supra*.

Plaintiff argues that there existed a question of fact regarding whether the condition that caused plaintiff to fall was open and obvious. We disagree. Defendant presented evidence that it was sunny on the day of the accident and plaintiff did not remember if she looked where she was walking or if she was talking to her sister when she fell. The photographs submitted by defendant show that the ramp where plaintiff fell had an indentation between the concrete and the asphalt. Plaintiff failed to present any evidence whatsoever in opposition to defendant's motion. Consequently, there was no evidence showing that an average person with ordinary intelligence would not discover this condition upon casual inspection. The trial court correctly found that the depression between the concrete and asphalt on the handicap access ramp was open and obvious.

Plaintiff argues that, even if the condition was open and obvious, defendant remains liable for the harm to plaintiff because the condition presented an unreasonable risk of harm. We disagree. If a condition creates a risk of harm only because the invitee does not discover or realize its danger, then the open and obvious doctrine cuts off liability if the invitee should have discovered the condition and realized the danger. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 610-611; 537 NW2d 185 (1995). However, if the risk of harm remains unreasonable, despite its

obviousness or despite knowledge of it by the invitee, then the invitor may have a duty to take reasonable precautions to protect the invitee. *Id.*

In the instant case, plaintiff presented no evidence upon which a rational factfinder could conclude that, notwithstanding its open and obvious nature, the depression between the asphalt parking lot and the cement ramp presented an unreasonable risk of harm.¹ Plaintiff's only asserted bases for finding that the ramp was dangerous was that it was a handicap access ramp leading to a parking lot and that she did not see the depression between the ramp and the parking lot. Plaintiff asserts that, because the ramp leads to a parking lot, an invitee's attention would be distracted by the traffic. This assertion, however, fails to show that the condition was unusual or that the condition presented an *unreasonable* risk of harm, notwithstanding its open and obvious nature. Therefore, the trial court properly granted summary disposition for defendant.

Affirmed.

/s/ Henry William Saad
/s/ Richard Allen Griffin
/s/ Robert B. Burns

¹ Plaintiff attaches the deposition testimony of defendant as "Exhibit 5" to her brief on appeal. However, because this evidence was not presented before the trial court in opposition to defendant's motion for summary disposition, it may not be considered on appeal. MCR 7.210(A)(1); *Harkins v Dep't of Natural Resources*, 206 Mich App 317, 323; 520 NW2d 653 (1994).