STATE OF MICHIGAN

COURT OF APPEALS

DORIS HUBBARD,

Plaintiff-Appellee,

v

MEIJER, INC. a/k/a MEIJER THRIFTY ACRES,

Defendant-Appellant.

UNPUBLISHED
April 20, 2001

No. 216925
Oakland Circuit Court
LC No. 95-509997-NI

Before: Bandstra C.J., and Wilder and Collins, JJ.

PER CURIAM.

Defendant appeals as of right the circuit court's orders denying its motions for summary disposition, reconsideration and directed verdict in this premises liability case. We reverse and remand.

Plaintiff, an invitee at defendant's department store, was injured when she fell on uneven pavement while crossing defendant's parking lot. After getting out of her car, plaintiff walked toward the entrance of the store. In order to enter the store, plaintiff had to cross a four-way intersection. As she reached the side of the intersection closest to the store entrance, her left foot tripped on the uneven pavement between the asphalt parking lot and the concrete sidewalk entrance, causing her to suffer a fractured left wrist and right shoulder. According to defendant's store manager, the difference in the concrete sidewalk and asphalt parking lot is a range of between "a quarter of an inch to maybe a half an inch" and that this condition was typical of any area where asphalt meets concrete at defendant's store. Plaintiff did not provide any evidence disputing the store manager's claim, but testified that the difference in height was "maybe an inch."

Following her injury, plaintiff filed suit against defendant alleging that defendant had a duty to maintain its premises in a reasonably safe manner, free from unreasonably dangerous and defective conditions, to inspect the premises and to warn her of the raised pavement between the parking lot and the entranceway of its store. Plaintiff alleged that defendant breached these duties causing her injuries. The circuit court denied defendant's motions for summary disposition, reconsideration, and directed verdict, finding that the motor vehicle and pedestrian traffic at defendant's store on the day of plaintiff's accident raised genuine issues of material fact regarding the continuing duty of defendant to warn and protect despite the open and obvious

nature of the condition on the sidewalk. The jury returned a verdict for plaintiff, assessing damages at $200,000 and then reducing that amount by fifty percent to reflect plaintiff's comparative negligence.

Defendant argues that the circuit court erred in denying its motions for summary disposition and directed verdict because plaintiff failed to establish a question of fact regarding whether the condition on defendant's premises was unreasonable despite its open and obvious nature. We agree.

A trial court's ruling on motions for summary disposition and directed verdicts are reviewed de novo. *Gauntlett v Auto-Owners Ins Co*, 242 Mich App 172; 617 NW2d 735 (2000). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 210 (1998). In reviewing a motion for summary disposition brought under this sub-rule, a trial court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in favor of the nonmoving party to determine whether a genuine issue of material fact exists. *Id.*; MCR 2.116(G)(5). In reviewing a trial court's ruling on a motion for directed verdict, this Court reviews the evidence presented up to the time of the motion in a light most favorable to the nonmoving party. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 663; 575 NW2d 745 (1998); *Thomas v McGinnis*, 239 Mich App 636, 643-644; 609 NW2d 222 (2000). This Court will grant the nonmoving party every reasonable inference, and evidentiary conflicts will be resolved in that party's favor. *Id.* The trial court may only grant a directed verdict if no factual question exists. *Michigan Mut Ins Co v CNA Ins Co*, 181 Mich App 376, 380; 448 NW2d 854 (1989).

Open and obvious conditions "are not ordinarily actionable unless unique circumstances surrounding the area made the situation unreasonably dangerous." *Bertrand v Alan Ford Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995) (emphasis omitted). "Where there is something unusual about the [danger], because of [its] 'character, location, or surrounding conditions,' then the duty of the possessor of land to exercise reasonable care remains." *Id.* at 617. In other words, while a landowner has no duty to warn invitees of dangerous conditions on their land that are open and obvious, possessors of land may still have a duty to protect invitees from open and obvious conditions that pose an unreasonable risk of harm. *Id.* at 611; *Milliken v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 494; 595 NW2d 152 (1999), citing 2 Restatement Torts, 2d, § 343A, 218.

The parties agree that the raised pavement on which plaintiff tripped was open and obvious at the time of the accident. Thus, the dispositive question is whether the raised pavement was unusual in its character or condition such that it posed an unreasonable risk of harm despite its open and obvious nature. Plaintiff admitted in her deposition that she was capable of discovering the rise in the sidewalk on casual inspection because nothing obstructed her view, the day was "beautiful," and the area of the fall was visible to her. Plaintiff stated that she was watching the heavy traffic and other pedestrians with shopping carts and thus simply did not notice the uneven pavement on which she fell. In view of this evidence, plaintiff argues that had the lot been designed differently, she could have made her way to the entrance of defendant's store by a safer route and would not have had to direct her attention to avoiding automobile

traffic. However, walking in a parking lot necessarily involves directing attention to automobile traffic, particularly around the holiday season when parking lots are extremely crowded. Plaintiff's proofs did not demonstrate that there was something "unique" or "unusual" about the character, location and surrounding conditions of the area in which plaintiff fell. The fact that the parking lot could have been designed to provide greater safety does not make it *unreasonably dangerous*. Cf *Mallard v Hoffinger Industries, Inc* 222 Mich App 137, 141; 564 NW2d 74 (1997) (Defendant was not negligent in failing to use a different design for a milk carrier because the construction of the carrier and its possible risks were "plain enough to be seen by anyone." *Id*., citing *Fisher v Johnson Milk Co, Inc*, 383 Mich 158, 160-162; 174 NW2d 752 (1970)); See also *Lawrenchuk v Riverside Arena, Inc*, 214 Mich App 431, 435; 542 NW2d 612 (1995) ("Plaintiff must produce expert testimony demonstrating that the step and openings between the skating area and the carpeted aisle constituted an unreasonable risk to patrons of the [skating] rink.").

Further, it is not relevant whether plaintiff had ever seen the raised portion of the concrete or had ever walked that route to the store before because there was no evidence that the nature of the condition was not discoverable by an ordinary person upon casual inspection, *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993), or that there was anything unusual about the condition because of its character, location, or surrounding circumstances. *Bertrand*, *supra* at 617. Accordingly, because plaintiff failed to create a factual question regarding whether the uneven pavement presented an unreasonable risk of harm despite its open and obvious nature, summary disposition in favor of defendant was appropriate. *Bertrand*, *supra*.

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

/s/ Richard A. Bandstra
/s/ Kurtis T. Wilder
/s/ Jeffrey G. Collins