STATE OF MICHIGAN

COURT OF APPEALS

DEBORAH POWELL,

Plaintiff-Appellant,

v

LINDA PIPPIN and DONALD DIEROLF,

Defendants-Appellees.

UNPUBLISHED
November 26, 2002

No. 237560
Macomb Circuit Court
LC No. 2000-004923-NO

Before: Markey, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Plaintiff Deborah Powell appeals by right a grant of summary disposition in favor of defendants Linda Pippin and Donald Dierolf pursuant to MCR 2.116(C)(10). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

This personal injury claim involves a trip and fall that occurred on October 18, 1998. Plaintiff sought to inspect one unit of a duplex owned by defendants for possible rental and went to the home. Defendants were business partners who owned the home, but did not reside in it. Plaintiff injured her ankle when she placed her foot in a depression, caused by an unevenness in the driveway, as she walked from her car toward the garage, where defendant Pippin was motioning her to enter the house. During her deposition, Pippin did not dispute plaintiff's version of the events leading up to the accident, but added that she had told plaintiff to be careful when plaintiff got out of her car. The trial court granted defendants' motion for summary disposition after finding that the danger posed by the driveway defect was open and obvious.

Plaintiff argues that the trial court erred as a matter of law in determining that the crack in the driveway was open and obvious. A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim, and is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available, *Id*., and all inferences are drawn in favor of the nonmovant, *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994).

The duty a possessor of land owes to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm does not generally encompass removal of open and obvious dangers. *Perkoviq v Delcore Homes-Lake Shore Pointe, Ltd*, 466 Mich 11, 16; 643 NW2d 212 (2002); *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001).

Plaintiff first argues that reasonable minds could differ as to whether the danger in the instant case was, in fact, open and obvious. We disagree. "Whether a danger is open and obvious depends on whether it is reasonable to expect an average user of ordinary intelligence to discover any danger upon casual inspection." *Weakley v Dearborn Hgts*, 240 Mich App 382, 385; 612 NW2d 428 (2000).

After examining the photographs provided by the parties and the testimony presented below, we conclude that a reasonable jury could not differ as to whether the danger posed by the two inch crack in the sidewalk could have been detected by one with ordinary intelligence upon a casual inspection. The accident happened at approximately 2:00 p.m. on a sunny day. According to plaintiff, the crack extended the whole width of the driveway slab and represented a height difference of approximately two inches between the adjoining sections of pavement. Both plaintiff and defendant have presented photographic representations of the driveway imperfection upon which plaintiff tripped. Although the vantage points of the photographs presented are not optimal, upon casual inspection, an individual with average intelligence could clearly see the crack, and its danger, from either side upon approach.

In support of her claim, plaintiff cites to the fact that defendant Pippin stated that she warned plaintiff because she was concerned that plaintiff could not see the crack. However, when asked whether she thought that the crack was a dangerous condition, Pippin replied that it posed a danger "if you wasn't [sic] watching where you were going." Plaintiff admitted that there was no obstruction that blocked her path to the cracked area. It is clear from her testimony that plaintiff simply did not see the crack because she was looking at Pippin, rather than where she was walking, when she fell. Thus, the trial court did not err in finding that the crack was an open and obvious danger.

Plaintiff next argues that, even if this Court agrees with the trial court's finding that the driveway defect was open and obvious, she presented sufficient evidence to allow a jury to find that the defect remained unreasonably dangerous notwithstanding its open and obvious nature. Again, we disagree. Only if special aspects of a condition make an open and obvious risk unreasonably dangerous, does the landowner have a duty to undertake reasonable precautions to protect invitees from that risk. *Lugo, supra* at 517. "[O]nly those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Id*. at 519. Typical open and obvious dangers, such as cracks in a driveway, do not give rise to these special aspects. *Id*. at 520 (ordinary pothole is a typical open and obvious danger); *Perkoviq, supra* at 19-20 (ice/snow build-up on a sloping rooftop is a typical open and obvious danger). Similarly, we believe that the danger here was not so "unique," nor the severity of likely harm so great, as to give rise to an exception to the open and obvious danger doctrine. Plaintiff's failure to discover the danger despite its obviousness is insufficient to change this result. *Perkovq, supra* at 18.

Plaintiff last argues that, even if Pippin did not initially have a duty to warn plaintiff of the dangerous condition of the driveway, once she assumed the duty by warning plaintiff to be careful, she was required to act reasonably.[1] Plaintiff maintains that Pippin's failure to provide a

[1] We note that plaintiff gave no indication of having heard Pippin warn her to be careful.

more specific warning was arguably unreasonable and that the warning caused plaintiff to become distracted which caused her to fail to notice the danger. We disagree.

Plaintiff maintained that she fell shortly after Pippin addressed her to request that she enter the home through the garage. However, plaintiff also stated that she had not looked at the driveway even before Pippin addressed her. Plaintiff's deposition testimony supports the trial court's decision. Pippin did not "distract" plaintiff with a warning because plaintiff was not looking at the driveway in the first place. As noted by the trial court, any warning by Pippin would, if anything, have caused plaintiff to become more aware of her surroundings. While plaintiff argues that her conversation with defendant was a distraction, there is certainly nothing "unusual" about speaking to another while walking. Accordingly, this is not a factor that removes this case from the open and obvious danger doctrine. See *Lugo*, *supra* at 522. Therefore, because plaintiff has failed to present a question of material fact, we find that the trial court did not err in granting defendants' motion for summary disposition.

Affirmed.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Michael R. Smolenski