STATE OF MICHIGAN

COURT OF APPEALS

MARIAN L. CRAWFORD,

Plaintiff-Appellant,

V

CVS/PHARMACY #8105, d/b/a ARBOR DRUGS, INC., and STUART FRANKEL DEVELOPMENT COMPANY,

Defendants-Appellees.

UNPUBLISHED
October 12, 2004

No. 248378
Oakland Circuit Court
LC No. 02-039678-NO

Before: Kelly, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Plaintiff, Marian L. Crawford, appeals as of right an order granting defendants summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff was born in 1929, and she frequently shopped at defendant CVS/Pharmacy #8105, d/b/a Arbor Drugs, Inc. (CVS), in Farmington Hills. In April 2001, plaintiff visited CVS in search of place cards for her bowling banquet. Not finding any, plaintiff left the store and tripped on a crack in the asphalt while walking across the parking lot to her vehicle. Plaintiff fell and sustained a fracture to her right hip, requiring hip replacement surgery.

On appeal, plaintiff contends that the trial court erred in granting defendants summary disposition because the hazardous condition at issue was not open and obvious and contained special aspects to make it effectively unavoidable or unreasonably dangerous. We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). We must review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek, supra* at 337. When deciding a motion for summary disposition, a 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 Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). A motion for summary disposition may be granted when the movant is entitled to judgment as a matter of law, or the affidavits or other proofs show that there is no genuine issue of material fact. *Morales, supra* at 294.

It is not disputed that plaintiff is an invitee. Generally, a landowner has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). This duty does not, however, extend to hazardous conditions that are open and obvious. "Where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Id.* The test for an open and 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. *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002); *Novotney v Burger King Corp*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). Because the test is objective, we look not to whether a plaintiff should have known that the condition was hazardous, but to whether a reasonable person in her position would foresee the danger. *Joyce, supra* at 238-239; *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997).

Plaintiff first argues that because the asphalt did not crumble until she stepped on it, its hazardous nature was not "open and obvious" within the meaning of *Lugo, supra* at 516, and not visible upon "casual inspection" pursuant to *Novotney, supra* at 470. Upon de novo review of the record, we conclude that plaintiff's deposition does not provide any support for such a conclusion. When applying the above objective test to the facts of this case, we conclude that an average user with ordinary intelligence would have been able to discover the danger of the asphalt cracking and crumbling. *Joyce*, *supra* at 238-239. Plaintiff testified that she did not see the cracks in the asphalt because she was looking straight ahead and was not looking down at the ground. However, as the *Novotney* Court noted, it is not relevant whether plaintiff could have seen the cracks in the asphalt. *Id*. The ultimate question is whether the cracked and crumbling asphalt could have been discoverable by an ordinary user upon casual inspection. *Id.*

Here, the photographic evidence clearly shows the asphalt crumbling and cracking in the parking lot. Moreover, plaintiff testified that, before the incident, she had visited this CVS "millions of times" over the years, walked through the same parking lot "umpteen times," and yet had never complained to CVS about the condition of the parking lot. Plaintiff admitted that, on the day of incident, she could have avoided the cracks in the asphalt if she had been paying attention. She testified that the parking lot was wide and that nothing blocked her view as she approached her vehicle. It was also a "nice day" with "plenty of light." Plaintiff recalled that, before she fell, she was thinking whether she should go to another store to purchase the place cards or go home. Then, she stepped on the cracked and crumbling asphalt and fell. Plaintiff's deposition testimony thus established that plaintiff was not paying attention to where she was walking as she approached her vehicle.

While an average person of ordinary intelligence is not required to closely inspect every inch of a surface upon which he or she might step, public policy requires a person to take reasonable care for his or her own safety. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 616-617; 537 NW2d 185 (1995). Here, it is reasonable to conclude from plaintiff's testimony that plaintiff would not have been injured if she had been watching the area where she was walking. *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 497; 595 NW2d 152 (1999). Plaintiff brought forth no evidence that the cracked and crumbling asphalt was not discoverable

by an ordinary user upon casual inspection. *Novotney, supra* at 475. Therefore, we conclude that the condition of the asphalt was open and obvious.

Plaintiff also argues that even if the condition of the asphalt is open and obvious, special aspects of the asphalt made it effectively unavoidable pursuant to *Lugo, supra* at 512. Specifically, plaintiff contends that the advanced state of deterioration of the cracked asphalt deprived her of any reasonable alternative route through the parking lot. The *Lugo* Court held that a landowner is not required to protect an invitee from an open and obvious danger unless "special aspects" of the condition make it unreasonably dangerous. *Lugo, supra* at 517. Special aspects that serve to remove a condition from the open and obvious danger doctrine are those that "give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided." *Id.* at 519.

We conclude that there were no special aspects of the cracked and crumbling asphalt that rendered its condition unreasonably dangerous. First, the cracked and crumbling asphalt was not effectively unavoidable because plaintiff could have walked on solid asphalt all the way to her vehicle, as she testified. Plaintiff also testified that the parking lot was wide and she could have walked anywhere she chose in order to get to her vehicle. Moreover, plaintiff testified that, after the incident, she continued to frequent CVS, parked in another lane, and walked through the parking lot in the area where she fell without incident. Therefore, unlike the example provided in *Lugo, supra* at 8, where a customer must walk through standing water to leave via a hypothetical building's only exit, plaintiff in this case had a reasonable alternate route of getting to her vehicle and could have easily avoided the cracked asphalt.

Moreover, liability will not be imposed "merely because a particular open and obvious condition has some potential for severe harm." *Lugo, supra* at 8 n 2. The *Lugo* Court did not find that ordinary pavement potholes in parking lots contain "special aspects" and concluded that such "everyday occurrences" should ordinarily be observed by a reasonably prudent person. *Id.* at 520, 523. We agree and maintain that cracks in asphalt are even more common than such potholes. Arguably, the crumbling asphalt may have "some potential for severe harm," but plaintiff failed to show any evidence that the crumbling asphalt presented "a substantial risk of death or severe injury," or that a typical person tripping on the crumbling asphalt would suffer severe injury or a substantial risk of death. *Id.* at 518, 520. Therefore, we conclude that the crumbling asphalt was not only an open and obvious condition, but also, there were no "special aspects" of the asphalt creating an unreasonable risk of harm. The trial court properly granted summary disposition in favor of defendants.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Hilda R. Gage
/s/ Brian K. Zahra