STATE OF MICHIGAN

COURT OF APPEALS

ANDREA CHAMPAGNE,

Plaintiff-Appellant,

v

WILLIAM V. LICARI, Trustee of WILLIAM V. LICARI TRUST,

Defendant-Appellee,

and

GREEN VALLEY, INC., and DUNKIN DONUTS, INC.,

Defendants.

UNPUBLISHED
October 4, 2005

No. 254372
Oakland Circuit Court
LC No. 02-044752-NO

Before: Bandstra, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court orders that granted summary disposition to defendants and dismissed this premises liability action. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff parked her car in defendants' parking lot, exited the vehicle, picked up her young daughter, and walked toward the Dunkin Donuts, in the process stepping into a pothole and injuring her foot. Plaintiff testified that the parking lot was wet and generally in disrepair making the pothole over which she tripped hard to see. Plaintiff also admitted that she was not looking at the ground while she was walking because she was focusing on the busy and chaotic traffic traversing the parking lot at the time. The trial court dismissed the case on the ground that the pothole over which she tripped was an open and obvious hazard, and that no special condition caused it to pose an unusual danger despite its openness and obviousness. On appeal, plaintiff challenges these conclusions. We agree with the trial court.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). In evaluating a motion brought under MCR 2.116(C)(10), a court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in a light most favorable to

the party opposing the motion. *Id.* "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law."

Plaintiff was a business invitee because the "premises were held open for a commercial purpose." *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 604; 614 NW2d 88 (2000) (emphasis deleted). Generally, a premises owner "owes a duty to an invitee to exercise reasonable care to protect the 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). However, "a premises possessor is not required to protect an invitee from open and obvious dangers [unless] special aspects of a condition make an open and obvious risk unreasonably dangerous." *Id.* at 517.

A condition is open and obvious if "it is reasonable to expect an average user of ordinary intelligence to discover the danger upon casual inspection." *Weakley v Dearborn Hgts*, 240 Mich App 382, 385; 612 NW2d 428 (2000). A court considering this question must "focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff." *Lugo, supra* at 523-524.

Plaintiff argues that the pothole was not open and obvious because the parking lot was in "bad shape," making it hard to see the particular pothole over which she tripped. Plaintiff argues that the parking lot was in disrepair and the photographs plaintiff submitted as evidence well illustrate the point. Under the circumstances an average user of ordinary intelligence would discover any danger on casual inspection and therefore the condition was open and obvious.

Plaintiff also argues that the parking lot was busy and chaotic at the time, which required her to look for traffic instead of concentrating on where she was walking. However, "there is certainly nothing 'unusual' about vehicles being driven in a parking lot, and accordingly, this is not a fact that removes this case from the open and obvious doctrine." *Lugo, supra* at 522.

Plaintiff alternatively argues that the pothole was unavoidable and unreasonably dangerous, even if open and obvious. Again, a premises owner has a duty to protect invitees from open and obvious conditions if special aspects of the conditions make them unreasonably dangerous, despite their openness and obviousness. *Lugo, supra* at 517. Such situations involve conditions that are effectively unavoidable or impose an unreasonably high risk of severe harm. *Id.* at 518. Plaintiff admitted that she could have avoided the pothole by parking in another area of the parking lot. In addition, ordinary potholes in a parking lot do not give rise to special aspects because they do not "involve an especially high likelihood of injury." *Lugo, supra* at 520. Plaintiff presented no evidence suggesting that the pothole at issue was other than common and ordinary.

For these reasons, the trial court did not err in determining that the pothole over which plaintiff tripped was not a special condition making it unreasonably dangerous.

Affirmed.

/s/ Richard A. Bandstra
/s/ Janet T. Neff
/s/ Pat M. Donofrio