STATE OF MICHIGAN

COURT OF APPEALS

ROSE L. TYRO,

Plaintiff-Appellee,

v

BUILDERS ASSOCIATION OF SOUTHEASTERN MICHIGAN,

Defendant-Appellant.

UNPUBLISHED
June 2, 2009

No. 283410
Macomb Circuit Court
LC No. 06-004193-NO

Before: Servitto, P.J., and O'Connell and Zahra, JJ.

PER CURIAM.

Defendant appeals, by leave granted, an order denying its motion for summary disposition. Because the condition causing plaintiff's fall was open and obvious and no special aspects of the condition removed it from the application of the open and obvious doctrine, we reverse.

Plaintiff initiated this negligence action after she tripped over a raised wire cover at a home improvement show defendant held at an event center. Plaintiff alleged that defendant breached its duty of due and reasonable care in failing to protect her from the condition that caused her to fall, and that defendant improperly operated and maintained its premises such that the condition constituted a nuisance. Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that the condition complained of was open and obvious and that it thus owed (and breached) no duty to plaintiff to protect her from the condition. The trial court disagreed, denying defendant's motion for summary disposition and its later motion for reconsideration. This Court granted defendant leave to appeal the summary disposition ruling.

Though defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), the parties have gone beyond the pleadings in presenting their arguments and the trial court appears to have based its decision on the standard set forth in MCR 2.116(C)(10). We will therefore review defendant's claim under MCR 2.116(C)(10). *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007).

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). This Court

reviews "a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition "is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.* "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

On appeal, defendant first argues that the condition was open and obvious. We agree.

In a premises liability action, the plaintiff must prove the elements of negligence: 1) defendant had a duty to plaintiff, 2) defendant breached that duty, 3) an injury proximately resulted from that breach, and 4) plaintiff suffered damages. *Benton v Dart Properties*, 270 Mich App 437, 440; 715 NW2d 335 (2006). With respect to the duty element, there is no dispute that plaintiff was an invitee, i.e. one who enters the land of another for a commercial purpose. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000). In general, a premises possessor 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). This duty does generally not extend, however, to conditions that are open and obvious. *Id.*

The test to determine if a condition is open and obvious is objective. *Corey v Davenport College of Bus*, 251 Mich App 1, 5; 649 NW2d 392 (2002). This Court does not consider whether the plaintiff actually saw the allegedly hazardous condition, but rather, whether "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Ververis v Hartfield Lanes (On Remand)*, 271 Mich App 61, 64; 718 NW2d 382 (2006), quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

In this matter, plaintiff testified that she tripped over an object located in the walkway between booths at a home show and fell to the ground. Regarding the lighting conditions, plaintiff conceded that the area "was lit up. It wasn't dark." When shown pictures of a wire cover with yellow sides and a black top, plaintiff testified that that was the type of thing that she had tripped on, but that she did not recall it having yellow sides. While affidavits from employees of the event center indicate that these covers were in use during the home improvement show in February 2005, plaintiff recalled the object being only a black hump. She also testified that one photo showed a wire cover that appeared to be flatter than the one she tripped over and another photo showed appeared to show a higher wire cover. After she fell, plaintiff did not look to see what had caused her fall. However, plaintiff testified that she had been walking around the show for perhaps a couple of hours before she fell and that she probably had encountered the wire covers before. When she fell, plaintiff was looking toward the exit, not at the ground and, according to plaintiff, if she were looking down, she probably would have seen the wire cover.

In *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490; 595 NW2d 152 (1999), the plaintiff was washing windows on her mobile home when she caught her foot on a utility pole support wire. *Id.* at 492. "At her deposition, [the] plaintiff admitted that 'if I was

looking for it I would have seen it' but that she did not because 'I was looking at windows and where I was putting my stuff.'" *Id.* This Court held that "the simple fact is that [the] plaintiff would not have been injured had she noticed the wire. Accordingly, the open and obvious doctrine was properly applied by the trial court." *Id.* at 497.

Where plaintiff testified that she probably would have seen the wire cover had she looked down, as in *Millikin*, the open and obvious doctrine applies. Liability may still be imposed on the landowner, however, if there are "'special aspects' of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm." *Lugo, supra* at 517. Like a commercial building with only one exit that is blocked by a hazardous condition, or an unguarded 30-foot pit in the middle of a parking lot, "only 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.

In *Lugo*, the Court held that a typical pothole in a parking lot does not involve an especially high likelihood of injury and "there is little risk of severe harm. Unlike falling an extended distance, it cannot be expected that a typical person tripping on a pothole and falling to the ground would suffer severe injury." *Id.* at 520. Similarly, plaintiff cannot prove that special aspects remove the wire cover from the open and obvious doctrine. Tripping over a three-inch wire cover, like the pothole discussed in *Lugo*, is not akin to falling an extended distance, and therefore, a typical person would not be expected to sustain severe injuries. *Lugo, supra*, at 520. In addition, even if other people had tripped, as alleged by a security guard, most attendees managed to avoid the hazard, as did plaintiff herself for the two hours she walked around the show prior to her fall. Thus, the purported danger was avoidable. Because the wire cover was an open and obvious danger and no special aspects served to remove it from the open and obvious doctrine, defendant owed plaintiff no duty concerning the condition and it was error for the trial court to deny defendant's motion for summary disposition.

Given our resolution of defendant's first issue on appeal, it is not necessary to discuss defendant's second argument on appeal.

Reversed.

/s/ Deborah A. Servitto
/s/ Peter D. O'Connell
/s/ Brian K. Zahra