STATE OF MICHIGAN

COURT OF APPEALS

MARY K. HALL,

Plaintiff-Appellant,

v

COMCAST OF MICHIGAN/MISSISSIPPI/TENNESSEE, INC.,

Defendant-Appellee,

and

COMCAST OAKLAND, COMCAST FLINT, COMCAST CLINTON, COMCAST MACOMB, COMCAST MT. CLEMENS, COMCAST SHELBY, COMCAST STERLING HEIGHTS, COMCAST UTICA, and COMCAST WARREN,

Defendants.

UNPUBLISHED
March 16, 2010

No. 289358
Oakland Circuit Court
LC No. 2008-088395-NO

Before: Servitto, P.J., and Bandstra and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals by right from the trial court's order granting defendant's motion for summary disposition.[1] We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff went to a Comcast service center to pay her cable bill. It was January 7, 2005, and defendant's parking lot had been plowed and salted earlier that day. Plaintiff possessed a permit for parking in handicap-accessible parking spaces. She parked in defendant's parking lot in one of the handicap-accessible spaces, got out of her vehicle, and stepped on what she thought was clear asphalt, but was really water covering a muddy depression just past the edge of the

[1] Comcast of Michigan/Mississippi/Tennessee was the only defendant remaining in the suit at the time of the trial court's decision. "Defendant" in this opinion refers to that entity.

asphalt. Plaintiff's right foot became stuck in the muddy depression. In the process of trying to free her foot, Plaintiff lost her balance and hit her shoulder on the side of her vehicle. Plaintiff sued defendant on a theory of premises liability. Specifically, her complaint alleged that she was required to park closer to one edge of the parking space than she normally would because the vehicle next to hers was encroaching on one side, and that "there was a partially water covered strip of black asphalt pavement which ran between the driver's side of plaintiff's car and the snowy median, and which appeared to offer enough room, as well as to be the only practical and effectively unavoidable way, for plaintiff to travel from her car to the building entrance." She further alleged that, "contrary to the appearance of said sole pathway, it was not entirely paved by asphalt but, instead, was partially asphalt, and partially a water covered muddy ditch which, on previous occasions, had been filled with concrete cinder blocks."

Granting defendant's motion for summary disposition, the trial court's written opinion stated:

> Here, viewing the evidence in a light most favorable to the plaintiff, she should have known and under the circumstances, 'an average person of ordinary intelligence [would] have been able to discover' the condition and the risk it presented. Novotny [sic, *Novotney*] [*v Burger King*, 198 Mich App 470; 499 NW2d 379 (1993)] at 475. Indeed, Plaintiff had parked in the same area several times before; Plaintiff testified that there was a car parked in one of the handicap-accessible parking spaces, in such a way as to encroach on part of the right parking space and the aisle between the two handicap-accessible parking spaces. Plaintiff testified that there were other open parking spaces available in the parking lot. It is clear that Plaintiff was presented with a choice: she could have parked in another space or returned at another time. She chose to park in the space and encounter the risk presented. The risk of parking outside of the parking space was open and obvious.

The court further found that "the condition presented did not present a substantial risk of death or severe injury. In any case, as stated, Plaintiff had a choice."

Plaintiff moved for reconsideration, asserting that the pleadings and documents she submitted supported her claim and defendant presented no documentary evidence in support of its defense. Specifically, she identified the complaint, the affidavit of Jack King (her fiancé), her own deposition, and the photographs King took the day of the incident.

The trial court denied the motion, issuing a written opinion and order on November 18, 2008. In addition to making the same findings it had in its original opinion, the court pointed to plaintiff's deposition testimony where she admitted she "already knew there was dirt or grass immediately next to the asphalt where she had chosen to park."

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the non-moving party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base

his case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

A premises possessor owes a duty to use reasonable care to protect invitees from an unreasonable risk of harm caused by dangerous conditions on the premises unless the dangers are open and obvious. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). "'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*. at 516 (quoting *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992)). However, where special aspects of a condition make even an open and obvious risk unreasonably dangerous, the possessor must take reasonable steps to protect invitees from harm. *Lugo*, 464 Mich at 517. Special aspects 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. Neither a common condition nor an avoidable condition is uniquely dangerous. *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 8-9; 649 NW2d 392 (2002).

Here, as the trial court noted, plaintiff testified in her deposition that she had parked in the same space before, knew there was dirt or grass immediately next to the asphalt, and knew that cinder blocks had been in that area. In the photographs she submitted, water is clearly visible at the edge of the space. Thus, even if another person might not have known of the condition, this plaintiff knew that the water covered not asphalt, but dirt. We find that because the condition was known to her, it was open and obvious under *Riddle* and *Lugo*.

Finally, plaintiff makes no attempt to argue there were special aspects about the condition that created a uniquely high likelihood of harm or severity of harm if the risk was not avoided. Nor does she argue that the condition was unavoidable. She only argues that she did not avoid it because she did not detect it.

Affirmed.

/s/ Deborah A. Servitto
/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood