STATE OF MICHIGAN

COURT OF APPEALS

MARIANNE R. RICEVUTO and ROBERT P. RICEVUTO, Plaintiffs-Appellees, v WASHTENAW AVENUE BOOKSTORE, L.L.C., Defendant-Appellant.	UNPUBLISHED August 17, 2010 No. 290033 Washtenaw Circuit Court LC No. 08-000604-NO

Before: WILDER, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's order denying defendant's motion for summary disposition in this trip and fall premises liability case. We reverse. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On July 26, 2007, at about 8:15 a.m., as plaintiff was attempting to walk into a store on defendant's premises, she tripped on a one-inch elevation between two sidewalk slabs and fell. This lawsuit followed. Defendant eventually moved for summary dismissal, arguing that the case was barred by the open and obvious doctrine because the height differential between the two sidewalk slabs was clearly discernable. Plaintiff responded that the defect was not open and obvious because the slabs were the same color and texture which masked the height differential. Following oral argument on the motion, the trial court agreed with plaintiff, holding that a question of fact existed as to whether the height differential was open and obvious in light of the "special circumstance"—the concrete slabs had the same consistency and appearance. Defendant's interlocutory application for leave to appeal followed, and was granted.

Defendant argues that the trial court erred in failing to grant its motion for summary disposition because the uneven sidewalk was open and obvious without any special aspects to bar the application of the open and obvious doctrine. After de novo review of the decision to deny defendant's motion for summary dismissal, and considering the evidence in a light most favorable to plaintiff, we agree with defendant. See *Spiek v Michigan Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993).

Generally, a premises owner 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. *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002). This duty does not include the removal of an

open and obvious danger, i.e., a danger that is either known to an invitee or is so obvious that the invitee is reasonably expected to discover it—unless a "special aspect" of the condition makes it unreasonably dangerous. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001). "[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 518-519. 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, plaintiff testified in her deposition that she did not see the height differential between the two sidewalk slabs because she was not looking down at the time she tripped and fell; rather, she was looking straight ahead. However, plaintiff testified, the condition at issue was noticeable from two or three feet away if one was looking at the ground. We note that the pictures of the condition support plaintiff's testimony. Thus, employing an objective standard, we conclude that "an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection." *Joyce*, 249 Mich App at 238 (citation omitted). Accordingly, the condition was open and obvious.

Further, the condition was not unreasonably dangerous. Sidewalks with slight height differentials between the cement slabs are fairly common and the condition is readily avoided by simply stepping over or around the slight elevation. See *Lugo*, 464 Mich at 518; *Kenny*, 264 Mich App at 117. Thus, plaintiff has failed to establish that special aspects of this open and obvious condition prevented the application of the open and obvious doctrine. Accordingly, the trial court should have granted defendant's motion for summary disposition.

Reversed and remanded for entry of an order of summary disposition in defendant's favor. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Henry William Saad