STATE OF MICHIGAN

COURT OF APPEALS

DAVID ASHEN,

Plaintiff-Appellant,

v

SANDY SCHMALTZ,

Defendant-Appellee.

UNPUBLISHED
May 17, 2016

No. 326024
Berrien Circuit Court
LC No. 14-000143-NO

Before: RIORDAN, P.J., and SAAD and MARKEY, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals the trial court's order, which granted defendant's motion for summary disposition. He also challenges the trial court's denial of his motion for reconsideration. Because the hazard in question was open and obvious, we affirm.

We review a trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(10) de novo. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). Summary disposition is proper under this subrule when "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id.* Also, we review a trial court's decision on a motion for reconsideration for an abuse of discretion. *Sanders v Perfecting Church*, 303 Mich App 1, 8; 840 NW2d 401 (2013). A court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

This case arises from the slip and fall that occurred when plaintiff went to help his daughter move out of her duplex, which was owned by defendant. Plaintiff walked around his truck, which he parked in the duplex's driveway, and tripped and fell when his foot stepped across a crack in the concrete. Plaintiff noted that the elevation difference between the concrete on one side of the crack to the other was "about two inches."

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Benton v Dart Props, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006). In Michigan, the duty owed by a

possessor of land depends on the visitor's status as a trespasser, licensee, or invitee. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). Tenants' social guests, such as plaintiff, are considered invitees of the landlord. *Stanley v Town Square Coop*, 203 Mich App 143, 148; 512 NW2d 51 (1993). A possessor is subject to liability for harm caused to invitees by a condition on the land if he

> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an *unreasonable* risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
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> (c) fails to exercise reasonable care to protect them against the danger. [*Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995).]

However, this duty to protect does not extend to dangers that are open and obvious. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). That is because "such dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid." *Hoffner v Lanctoe*, 492 Mich 450, 460-461; 821 NW2d 88 (2012). In determining whether a danger is open and obvious, the relevant inquiry is "whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Id.* at 461.

Here, there is no issue of fact as to whether the defect in the driveway was open and obvious. An ordinary user with average intelligence would have discovered the crack between the two slabs of concrete upon casual inspection. Plaintiff testified that the defect "looks like a pretty big crack" and that the difference in elevation between the slabs of concrete on either side of the crack was "about a couple inches maybe." He explained further that "You could see it readily." Further, photos that were submitted to the trial court show that the crack was indeed quite visible, even from a considerable distance away. Although plaintiff seems to rely on the fact that he did not see the crack at the time he fell, this is not the test. See *Bullard v Oakwood Annapolis Hosp*, 308 Mich App 403, 409; 864 NW2d 591 (2014) (stating that the test is an objective one, not a subjective one). Based on the evidence presented, no genuine issue of material fact existed regarding whether it was reasonable to expect that an average person with ordinary intelligence would have discovered the crack upon casual inspection; thus, the danger was open and obvious.

Further, the trial court did not abuse its discretion when it denied plaintiff's motion for reconsideration. MCR 2.119(F)(3) provides that a motion for reconsideration "which merely presents the same issues ruled on by the court" will not be granted. However, "a trial court has discretion on a motion for reconsideration to decline to consider new legal theories or evidence that could have been presented when the motion was initially decided." *Yoost v Caspari*, 295 Mich App 209, 220; 813 NW2d 783 (2012). "[T]he trial court also has the discretion to give a litigant a 'second chance' even if the motion for reconsideration presents nothing new." *Id.* Here, plaintiff's motion for reconsideration merely presented the same issues ruled upon by the trial court. Although it was not necessary for the trial court to consider new evidence, the trial court apparently reviewed the new evidence attached to plaintiff's motion before ultimately

finding that plaintiff failed to demonstrate palpable error. This was not outside the range of reasonable and principled outcomes, given that the trial court correctly granted defendant's motion for summary disposition. Accordingly, the trial court did not abuse its discretion when it denied plaintiff's motion for reconsideration.

Affirmed. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Michael J. Riordan
/s/ Henry William Saad
/s/ Jane E. Markey