STATE OF MICHIGAN

COURT OF APPEALS

RITA DELOR, Plaintiff-Appellant,	UNPUBLISHED October 18, 2016
v	No. 328179 St. Clair Circuit Court
VG'S GROCERY AND SPARTAN STORES, INC., Defendant-Appellee.	LC No. 14-000950-NO

Before: FORT HOOD, P.J., and GLEICHER and O'BRIEN, JJ.

PER CURIAM.

Plaintiff, Rita Delor, appeals as of right the circuit court's order granting summary disposition to defendant, VG's Grocery and Spartan Stores, Inc., pursuant to MCR 2.116(C)(10). We affirm.

This premises-liability lawsuit arises out of plaintiff's trip and fall outside of VG's Grocery in Marine City. When exiting the store, plaintiff tripped and fell on what she described as "uneven" pavement. She described her fall as follows: "My toe hit something very hard and I lost my balance and I fell." According to her complaint, she suffered the following as a result of this fall: a "[f]racture to the left ulna;" "[a]ggravation of previous rotator cuff repair;" "[i]njury to left great toe and right knee;" "[c]ontusions and abrasions;" "[s]evere shock, freight, and mental anguish;" "[p]ain and suffering;" and "[f]urther injuries which have not yet been diagnosed or manifested themselves and further that said injuries have necessitated hospital care and treatment, medications and/or other rehabilitative aides." Thus, she sought an undetermined amount of damages.

Defendant subsequently moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that any unevenness in the sidewalk would have been open and obvious to a reasonable person upon casual inspection. Plaintiff responded, arguing that because she could hardly see the unevenness of the sidewalk after her fall, it was not open and obvious. The trial court reserved its ruling, allowing the parties to complete discovery. Once discovery was completed, defendant renewed its motion for summary disposition, and the circuit court granted that motion, concluding, in relevant part, "that there has to be more than was present in this case in order to justify proceedings at trial."

Plaintiff now appeals, arguing that summary disposition pursuant to MCR 2.116(C)(10) was inappropriate in light of how difficult it was to see the unevenness of the sidewalk. We disagree.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Benton v Dart Props, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006). Summary disposition pursuant to MCR 2.116(C)(10) is appropriate "if the affidavits or other documentary evidence show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Decker v Flood*, 248 Mich App 75, 81; 638 NW2d 163 (2001). In reviewing a motion for summary disposition pursuant to MCR 2.116(C)(10), courts are required to consider the pleadings, affidavits, and other evidence in a light most favorable to the nonmoving party. *Id*.

In premises liability actions, a plaintiff must prove (1) that the defendant owed the plaintiff a duty, (2) that the defendant breached that duty, (3) that the breach was the proximate cause of the plaintiff's injury, and (4) that the plaintiff suffered damages, i.e., the elements of negligence. *Benton*, 270 Mich App at 440. While a land possessor owes a duty of reasonable care to protect an invitee from unreasonable risks of harm posed by dangerous conditions on the land, that duty does not require a land possessor to protect an invitee from dangerous conditions that are open and obvious. *Id*. at 440-441. Open and obvious dangers cut off a land possessor's duty because "there is an overriding public policy that people should take reasonable care for their own safety and this precludes the imposition of a duty on a landowner to take extraordinary measures to warn or keep people safe unless the risk is unreasonable." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 693-694; 822 NW2d 254 (2012) (citations and internal quotation marks omitted). A dangerous condition is open and obvious when an average user with ordinary intelligence would be able to discover it upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

Michigan courts have described uneven pavement as an "everyday occurrence" that constitutes an open and obvious condition unless there is something unusual about the circumstances surrounding the uneven pavement. See *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614-617; 537 NW2d 185 (1995). That is, "steps and differing floor levels, such as . . . uneven pavement . . . are not ordinarily actionable *unless* unique circumstances surrounding the area in issue made the situation unreasonably dangerous." *Weakley v City of Dearborn Hts*, 240 Mich App 382, 385; 612 NW2d 428 (2000) (citation and internal quotation marks omitted; emphasis in original), remanded for reconsideration on other grounds 463 Mich 980; 624 NW2d 188 (2001).

Applying those rules to the facts of this case, we agree with the circuit court's conclusion "that there has to be more than was present in this case in order to justify proceedings at trial." There is no dispute that plaintiff tripped and fell on uneven pavement. It is equally undisputed that, as plaintiff described in her deposition, "[t]he pavement was uneven," and she makes no effort whatsoever to identify any unique circumstances that would render such an open and obvious condition unreasonably dangerous. Under the caselaw referenced above, that condition is open and obvious as a matter of law. Plaintiff's argument against such a conclusion on appeal is unpersuasive. While plaintiff claims that "[t]here is nothing in the State of Michigan in the law that says that a Plaintiff must watch their feet every time their feet step upon somebody else's property," this claim ignores the fact that uneven pavement constitutes an open and

obvious danger unless a unique circumstance is present as a matter of law. *Bertrand*, 449 Mich at 616; *Lugo*, 464 Mich at 520; *Weakley*, 240 Mich App at 385. She does not, for example, claim that the lighting near the condition played a role in causing her fall. See, e.g., *Pincomb v Diversified Inv Ventures, LLC*, unpublished opinion per curiam of the Court of Appeals, issued February 16, 2016 (Docket No. 324989), pp 4-6. Plaintiff also points to her testimony that "she was looking in front of her and not at a cell phone" when she fell, but, perhaps more importantly, she also expressly testified that she "was not watching [her] feet." Accordingly, we conclude that there was nothing unique about the circumstances surrounding the uneven sidewalk where plaintiff fell.

Plaintiff also claims that the circuit court erred in relying on *Shutes v St. Mary's Med Ctr of Saginaw*, unpublished opinion per curiam of the Court of Appeals, issued April 5, 2007 (Docket No. 265749), and should have instead relied on *Siorakes v Target Corp*, unpublished opinion per curiam of the Court of Appeals, issued April 26, 2011 (Docket No. 295034). Both opinions serve as persuasive authority only, MCR 7.215(J)(1), so the circuit court was certainly not bound by one or the other. Furthermore, in light of the binding caselaw set forth above, the circuit court's decision was nevertheless correct. We therefore reject plaintiff's argument that the circuit court should have relied on one unpublished opinion over another.

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

/s/ Karen M. Fort Hood
/s/ Colleen A. O'Brien