STATE OF MICHIGAN

COURT OF APPEALS

DEBORAH HUDSPETH, Plaintiff-Appellee,	UNPUBLISHED September 18, 2012
v	No. 305339 Genesee Circuit Court
MEIJER, INC., a/k/a MEIJERS, INC., Defendant-Appellant.	LC No. 10-094595-NO

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

PER CURIAM.

Defendant appeals the trial court's order that denied its motion for summary disposition. For the reasons set forth below, we reverse.

Plaintiff alleged that, on April 6, 2009, she was pushing a full shopping cart to the parking lot of defendant's store when the cart hit a crack and tipped over. According to plaintiff, she sustained injuries when she fell on top of the cart. In its motion for summary disposition, defendant argued that the crack was an open and obvious condition, but the trial court ruled that there is a genuine issue of material fact on this issue.

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Allen v Bloomfield Hills School Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008).[1] "In a premises liability action, a plaintiff must prove the elements of negligence: (1)

[1] A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Liparoto Constr Co v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). The 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 of 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).

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 Properties*, 270 Mich App 437, 440; 715 NW2d 335 (2006). Generally, an invitor must "exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land that the landowner knows or should know the invitees will not discover, realize, or protect themselves against." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). "However, a premises possessor is not generally required to protect an invitee from open and obvious dangers." *Watts v Mich Multi-King, Inc*, 291 Mich App 98, 102; 804 NW2d 569 (2010). "The standard for determining if a condition is open and obvious is whether an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection." *Slaughter v Blarney Castle Oil*, 281 Mich App 474, 478; 760 NW2d 287 (2008) (internal quotation omitted; citation omitted). "The test is objective, and the inquiry is whether a reasonable person in the plaintiff's position would have foreseen the danger, not whether the particular plaintiff knew or should have known that the condition was hazardous." *Id.* at 479.

Here, there is no genuine issue of material fact regarding the open and obvious nature of the crack in defendant's parking lot. Plaintiff testified that the crack was 12 feet long, four inches wide, and one inch deep. Testimony about and photographs of the crack establish that it was open and obvious. Indeed, the crack is similar in size and depth to a common pothole. Under Michigan law, a common pothole is open and obvious because an average person of ordinary intelligence would be able to observe and avoid the condition. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 520; 629 NW2d 384 (2001).

Plaintiff attempts to distinguish her case because she fell after her shopping cart hit the crack and because her view of the parking lot was obstructed by her shopping cart. The open and obvious doctrine looks to whether the condition itself is so open and obvious that "an average user with ordinary intelligence would have been able to discover the danger and risk presented upon casual inspection." *Slaughter*, 281 Mich App at 478. The open and obvious analysis is objective, *Id*. at 479, and does not focus on the manner in which a plaintiff encountered the condition. In addition, plaintiff's use of a shopping cart does not distinguish her case. In a store parking lot, customers frequently walk with shopping carts and, clearly, a shopping car cannot hide a crack that is 12 feet long. The risk of a shopping cart hitting a crack in a store parking lot is also one that an average person would be expected to recognize and discover upon casual inspection.

Plaintiff further argues that the crack was not open and obvious because it was "pitch black" outside and the lighting in the parking lot was poor. In *Singerman v Muni Service Bureau*, 455 Mich 135; 565 NW2d 383 (1997), the plaintiff claimed that poor lighting in a hockey rink prevented him from observing a hockey puck that hit him in the face. *Id*. at 143-144. The Court held that the hockey puck was open and obvious because there was nothing preventing the plaintiff from realizing that the hockey rink was poorly lit. *Id*. The reasoning in *Singerman* applies here. There was nothing to prevent plaintiff from noticing that it was dark outside and that the parking lot was poorly lit. When she left the store and observed the dark conditions, plaintiff was on notice of the need to proceed cautiously. Furthermore, plaintiff's own testimony contradicts her claim. Plaintiff testified that there was a light pole near where she fell, and she saw no burned out bulbs in the area. Furthermore, plaintiff testified that she did not

know if the lighting conditions prevented her from seeing the crack. Therefore, the crack was open and obvious even if it was dark outside and the lighting was poor.

Further, plaintiff failed to establish a genuine issue of material fact that special aspects of the condition should preclude the application of the open and obvious doctrine. The open and obvious doctrine does not apply if there are special aspects of the condition that make even an open and obvious risk unreasonably dangerous. *Watts*, 291 Mich App at 102. An open and obvious danger can be unreasonably dangerous when circumstances "give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided." *Lugo*, 464 Mich at 519. An unavoidable condition would constitute a circumstance leading to a uniquely high likelihood of harm. *Id*. at 518. An example of this would be a "commercial building with one exit for the general public where the floor is covered with standing water." *Id*. Circumstances that impose "an unreasonable high risk of severe harm" also give rise to special aspects. *Id*. An example of this would be "an unguarded thirty foot pit in the middle of a parking lot." *Id*. Indeed, our Supreme Court recently articulated what constitutes an "unavoidable" condition in *Hoffner v Lanctoe*, ___ Mich ___; ___NW2d ___ (2012) issued July 31, 2012 (Docket No. 142267), slip op at 16-17:

> The "special aspects" exception to the open and obvious doctrine for hazards that are effectively unavoidable is a limited exception designed to avoid application of the open and obvious doctrine only when a person is subjected to an unreasonable risk of harm. Unavoidability is characterized by an *inability to be avoided*, an *inescapable* result, or the *inevitability* of a given outcome. [FN32] Our discussion of unavoidability in *Lugo* was tempered by the use of the word "effectively," thus providing that a hazard must be unavoidable or inescapable *in effect* or *for all practical purposes.* Accordingly, the standard for "effective unavoidability" is that a person, for all practical purposes, must be *required* or *compelled* to confront a dangerous hazard. As a parallel conclusion, situations in which a person has a *choice* whether to confront a hazard cannot truly be unavoidable, or even effectively so.

Plaintiff argues that the crack was unavoidable, but she clearly could have avoided the crack by walking around it. Again, plaintiff's argument is also defeated by her own testimony. Plaintiff stated that she took a different route when she went into the store than the route she took when she left the store. Clearly, plaintiff was able to avoid the crack when she entered the store. Thus, plaintiff was not "*required* or *compelled* to confront a dangerous hazard," and her claim is, therefore, without merit. *Hoffner*, ___ Mich ___, slip op at 17.

Plaintiff asserts that special aspects also exist because of the poor lighting and because she had an obstructed view of the parking lot because of her shopping cart. For the same reasons discussed above, her arguments do not give rise to special aspects. Therefore, we hold that no genuine issue of material fact exists regarding the open and obvious nature of the crack in defendant's parking lot, and there were no special aspects that made the crack unreasonably dangerous.

Because the trial court should have granted summary disposition to defendant pursuant to the open and obvious danger doctrine, we need not decide whether there is a genuine issue of material fact about whether defendant had notice of the crack.

Reversed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Pat M. Donofrio