DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

LISA HARRIS, a married woman, Plaintiff/Appellant, v. PRINCE PROPERTIES, INC., an Illinois corporation, fka CMD PROPERTIES, INC., an Illinois corporation, Defendant/Appellee.	No. 1 CA-CV 10-0612 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2008-005998

The Honorable Jeanne M. Garcia, Judge

REVERSED AND REMANDED

Bohm & Jones, PC — Phoenix
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By Francis G. Passaro

And

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By Eileen Dennis GilBride
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T I M M E R, Judge

¶1 Lisa Harris appeals the trial court's grant of summary judgment in favor of Prince Properties, Inc. ("Prince") in her premises liability action. The court ruled that Prince was not negligent as a matter of law because Harris was aware of the defective grout line she claimed caused her to roll her ankle and fall resulting in injuries. Harris argues that whether Prince should have nevertheless anticipated that the defective condition could cause injury was a question for a fact-finder, precluding summary judgment. For the following reasons, we agree with Harris and therefore reverse the summary judgment and remand for additional proceedings.

FACTS AND PROCEDURAL HISTORY

¶2 Harris was employed by a law firm, whose offices were located in a commercial office building owned by Prince. Harris had worked at that location for approximately two-and-one-half years prior to her fall. The law firm office was on the second floor and was accessed via an exterior stairway. When Harris arrived at work she would usually use the stairs and then walk to the law firm door by crossing a terra-cotta-tile-type floor with concrete grout between individual tiles. Apparently because of a shifting support beam below the tile, the grout between two rows of tiles would sometimes become dislodged, creating an uneven walking surface. Harris was generally aware

the grout would become dislodged, knew it was periodically re-grouted by maintenance, and had sometimes seen wet grout in that grout line.

¶3 On March 26, 2007, Harris was returning to the office after purchasing a sandwich and drink for lunch. As she reached for the handle of the office door, the outside of her right foot rolled in the unfilled gap between the two rows of tile and she fell, striking the security glass adjacent to the law firm's door and injuring herself.

¶4 Harris filed suit against Prince for negligence. She alleged that the uneven walking surface caused by the absence of grout constituted an unreasonably dangerous condition, and that, as a result of Prince's negligence in maintaining that walking surface, she sustained injuries to her head, neck, and right shoulder and incurred health care expenses as well as lost wages and other damages.

¶5 Prince moved for summary judgment asserting that, as a matter of law, the condition of the grout line was not "unreasonably dangerous," given its open and obvious nature and Harris's knowledge of the condition. Harris responded that whether the condition was unreasonably dangerous must be resolved by a fact-finder. The court granted the motion. Noting Harris was aware of the condition of the grout line, the court found controlling a line of cases in which plaintiffs were

aware of the condition that caused the injuries. Quoting from *Forbes v. Romo*, 123 Ariz. 548, 550, 601 P.2d 311, 313 (App. 1979), the court stated:

> The true ground of liability is the proprietor's superior knowledge of the perilous instrumentality. It is when the careless instrumentality is known to the owner or occupier and not the person injured that a recovery is permitted. There is no liability for injuries from the dangers that are obvious or as well known to the person injured as to the owner or occupier.

The court found that Prince was not negligent as a matter of law and entered judgment accordingly. Harris timely appealed.

DISCUSSION

¶6 Summary judgment may be granted when "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c). In reviewing a motion for summary judgment, we determine de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000). We view the facts and the inferences to be drawn from those facts in the light most favorable to the party against whom judgment was entered. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996).

¶7 A possessor of property is obligated to discover and warn an invitee about or protect an invitee from an unreasonable

risk of harm on the property. *Bellezzo v. State*, 174 Ariz. 548, 551, 851 P.2d 847, 850 (App. 1992). A possessor of property is generally not liable for injuries resulting from conditions that are open and obvious or that are known to the invitee. *Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352, 356, 706 P.2d 364, 368 (1985). The basis of liability is the superior knowledge of the possessor of land regarding the defective condition. *Daugherty v. Montgomery Ward*, 102 Ariz. 267, 269, 428 P.2d 419, 421 (1967). The fact that a condition is open and obvious or within the knowledge of an invitee, however, does not necessarily mean that the condition is not unreasonably dangerous; it is a factor to be considered in determining whether the condition is unreasonably dangerous. *Murphy v. El Dorado Bowl, Inc.*, 2 Ariz. App. 341, 343, 409 P.2d 57, 59 (1965). When persons encountering an open and obvious defective condition or a known defective condition could be expected to take care of themselves without further precautions, the risk of harm is slight and therefore the condition is not unreasonably dangerous as a matter of law. *Burke v. Ariz. Biltmore Hotel, Inc.*, 12 Ariz. App. 69, 71-72, 467 P.2d 781, 783-84 (1970). On the other hand, when a reasonable possessor of property could anticipate an unreasonable risk of harm despite an invitee's knowledge of or the obviousness of a defective condition, the possessor could be found negligent for not taking further action

to protect the invitee. *Markowitz*, 146 Ariz. at 356, 706 P.2d at 368; *Silvas v. Speros Constr. Co.*, 122 Ariz. 333, 335, 594 P.2d 1029, 1031 (App. 1979); *Murphy*, 2 Ariz. App. at 344, 409 P.2d at 60.

¶8 A comment to the Restatement (Second) of Torts § 343A aptly summarizes a possessor's obligations regarding open and obvious or known conditions:

> There are . . . cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. This duty may require him to warn the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm.
>
> Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. In such cases the fact that the danger is known, or is obvious, is important in determining whether the invitee is to be charged with contributory negligence, or assumption of risk. [] It

> is not, however, conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances.

Restatement (Second) of Torts § 343A(1) cmt. f (1965). When reasonable minds could differ as to whether the possessor should have anticipated a risk of harm despite an invitee's knowledge, the question of whether the possessor was negligent is a question for a fact-finder. *See Tribe v. Shell Oil Co.*, 133 Ariz. 517, 519, 652 P.2d 1040, 1042 (1982); *Silvas*, 122 Ariz. at 335, 594 P.2d at 1031; *George v. Fox W. Coast Theatres*, 21 Ariz. App. 332, 335, 519 P.2d 185, 188 (1974).

¶9 The parties agree Harris was an invitee, and Prince therefore owed her a duty. The parties also agree Harris knew of the defect in the grout line. Harris argues her knowledge of the defect does not preclude a finding that Prince was liable. She contends Prince could still be liable despite her knowledge if Prince should have nevertheless anticipated an unreasonable risk of harm. She argues that whether Prince should have anticipated such a risk is a question of fact and therefore summary judgment was improper.

¶10 Harris cites several cases in support, focusing predominately on *Murphy* and *Silvas*. In *Murphy*, the plaintiff was a regular patron of defendant's bowling alley. 2 Ariz. App. at 341, 409 P.2d at 57. He was assigned to bowl on a particular lane, adjacent to which was a walkway that was lower than the

surface of the lane. *Id.* at 341-43, 409 P.2d at 57-59. The fact that the walkway was lower than the lane was obvious and known to both the patron and the owner. *Id.* at 342, 409 P.2d at 58. After throwing the ball, the plaintiff was watching to see how many pins would be hit, and took a step with his right foot and then his left. His left foot went over the drop-off to the walkway, causing the plaintiff to fall and sustain injury. *Id.* at 343, 409 P.2d at 59. The trial court directed a verdict for the defendant on the ground that the condition was obvious and known to the plaintiff. *Id.* at 341, 343, 409 P.2d at 57, 59. On appeal, this court noted that even though a condition is open and obvious, it could be considered unreasonably dangerous. *Id.* at 343, 409 P.2d at 59. The court decided that a defendant could be liable when the plaintiff knew of the danger but momentarily forgot it. In that case, the court recognized that the plaintiff was on the premises to play a game of athletic skill and that "[w]hat might be perfectly obvious to a person walking normally is likely to be forgotten by a contestant in the excitement of a game." *Id.* Because reasonable minds could differ as to whether the possessor was negligent by permitting the condition of the walkway, the court held that the issue should have been left to the jury. *Id.* at 344, 409 P.2d at 60.

¶11 In *Silvas*, the employee of a subcontractor sued a general contractor after falling through a hole in the roof of a

building under construction. 122 Ariz. at 334, 594 P.2d at 1030. The holes had been left in the roof to accommodate air conditioning units and ducts. *Id.* Plaintiff knew the holes were there and that they were dangerous, and he and some fellow employees placed mortar boards over some of the holes. *Id.* Plaintiff's job involved transporting bricks and mortar in a wheelbarrow, which might weigh as much as 200 pounds, across the roof. *Id.* He noticed that when the wheelbarrow was full he was not as able to see the holes in the roof. *Id.* On the day of the accident, plaintiff pushed a loaded wheelbarrow to the right to avoid a hole on the left, stepped into another uncovered hole, and fell, sustaining injuries. *Id.* Defendant knew that workers would be on the roof using wheelbarrows to transport building materials. *Id.* The trial court directed a verdict in favor of the general contractor. *Id.* at 333, 594 P.2d at 1029. This court reversed, concluding that one of the holes on the roof distracted plaintiff from seeing the hole through which he fell, and that the wheelbarrow contributed to the accident. *Id.* at 335, 594 P.2d at 1031. The court also held that, considering the number of holes on the roof, the fact that the contractor knew of the hazard if the holes were left uncovered, and knew that employees would be traveling across the roof with wheelbarrows, a jury question existed regarding whether the

contractor should have anticipated harm despite plaintiff's knowledge. *Id.*

¶12 Harris argues that Prince had knowledge the grout would crack and dislodge over time, as evidenced by repeated repairs of the problem, and that Prince therefore should have anticipated harm to pedestrians who might come in contact with the unfilled grout line. The question, however, is not whether Prince should have anticipated harm to persons generally, but whether Prince should have anticipated harm to Harris regardless of Harris's knowledge of the defective condition and her ability to guard against the risk of which she was aware.

¶13 As in *Murphy* and *Silvas*, evidence exists that Prince should have anticipated that even a knowledgeable invitee would forget about the unfilled grout. According to Harris's expert witness, the un-grouted condition was not particularly distinguishable from the other grout lines, would not be noticeable by a pedestrian, and was not, therefore, open and obvious. He opined that the condition was "unreasonably dangerous" because the grout line was un-grouted "and/or unmarked." Given this evidence, a jury could find that Prince should have anticipated that even tenant-employees, who know that sometimes the grout line was filled and sometimes it was not, may not always realize a particular area is not fully

grouted. Such a finding here may be particularly warranted as the un-grouted area was directly in front of the law firm's doorway – a location where an invitee like Harris might be distracted as she entered or exited the office. Indeed, Harris testified that at the time of her fall she was returning to the office with her lunch and "probably took my tea from my right hand and put it in my left hand put my sandwich on top of it and opened the door." It is for a fact-finder to decide whether Prince should have anticipated this circumstance.

CONCLUSION

¶14 For the foregoing reasons, we reverse the entry of summary judgment and remand to the trial court for additional proceedings.

/s/
Ann A. Scott Timmer, Judge

CONCURRING:

/s/
Diane M. Johnsen, Presiding Judge

/s/
Patricia A. Orozco, Judge