# STATE OF MICHIGAN

# COURT OF APPEALS

---

VIRGINIA COX,

Plaintiff-Appellant,

v

SINGH MANAGEMENT COMPANY, INC. and ARBORS OF WEST BLOOMFIELD,

Defendants-Appellees.

---

UNPUBLISHED
November 24, 1998

No. 203315
Oakland Circuit Court
LC No. 96-516412 NO

Before: Smolenski, P.J., and McDonald and Doctoroff, JJ.

PER CURIAM.

This case arose from plaintiff's trip and fall on a sidewalk outside of her apartment. Plaintiff appeals as of right from an order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff argues that the trial court erred in granting summary disposition in favor of defendants on the basis that the danger presented by the cracked and raised portion of cement was open and obvious. We disagree. This Court reviews a grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests whether there is factual support for a claim. *Michigan Mutual Ins Co v Dowell,* 204 Mich App 81, 85; 514 NW2d 185 (1994). The motion may be granted pursuant to MCR 2.116(C)(10) when, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Michigan Mutual, supra,* 204 Mich App 85. The trial court must consider the documentary evidence submitted by the parties and, giving the benefit of reasonable doubt to the nonmoving party, the trial court must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Id.*

To establish a prima facie case of negligence, plaintiff must produce evidence that: (1) defendants owed a legal duty to plaintiff; (2) defendants breached that duty; (3) plaintiff suffered damages, and (4) defendants' breach was the proximate cause of plaintiff's injury. *Schultz v Consumer Power Co,* 443 Mich 445, 449; 506 NW2d 175 (1993). Whether defendants owed a

duty to plaintiff is a question of law for the court. *Colangelo v Tau Kappa Epsilon,* 205 Mich App 129, 132; 517 NW2d 289 (1994).

A landlord owes its tenant the same duty and standard of care that a proprietor or landowner owes a business invitee. *Quinlivan v The Great Atlantic & Pacific Tea Co, Inc,* 395 Mich 244, 257, n 10; 235 NW2d 732 (1975); *Stanley v Town Square Cooperative,* 203 Mich App 143, 146-147; 512 NW2d 51 (1993). Therefore, the landlord's legal duty is "'to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition on the land' that the landlord 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), quoting *Williams v Cunningham Drug Stores, Inc,* 429 Mich 495, 499; 418 NW2d 381 (1988). However, the landlord's duty is not absolute, and does not extend to conditions from which an unreasonable risk cannot be anticipated or to dangers that are so open and obvious that an invitee may be expected to discover them on his own. *Bertrand, supra,* 449 Mich 610-611; *Williams, supra,* 429 Mich 500. On the other hand, if there is something unusual about an open and obvious danger, some "special aspect" that would make the risk of harm unreasonable, the duty of the possessor of the land to exercise reasonable care remains. *Bertrand, supra,* 449 Mich 611, 614. A danger is open and obvious if an average user of ordinary intelligence could have discovered the danger and risk presented upon casual inspection. *Novotney v Burger King Corp (On Remand),* 198 Mich App 470, 475; 499 NW2d 379 (1993). Whether a plaintiff actually perceived the alleged danger is not relevant. *Novotney, supra,* 198 Mich App 475.

Here, plaintiff argues that the defective section of the sidewalk was not an open and obvious danger. Plaintiff claims that she never noticed the defective section of the sidewalk because she normally enters her apartment through her garage and, since she was approaching the corner from the front of the garage, the defect located immediately around the corner was not visible. However, to survive defendants' motion for summary disposition, plaintiff was required to come forward with sufficient evidence to create a genuine issue of material fact that, upon casual inspection, an ordinary user could not have discovered the existence of the crack in the sidewalk. *Novotney, supra,* 198 Mich App 475. The photographs viewed by the trial court indicate that the cement is cracked and raised in a manner that would be apparent to anyone walking on the sidewalk. Although plaintiff claims it was too dark to see the cracked and raised portion of the cement from the angle she approached, the fact that she had lived in her apartment for four years before her fall indicates that she should have become aware of it at some point. Under these circumstances, we believe that an average user of ordinary intelligence could have discovered the danger and risk upon casual inspection. It is immaterial whether plaintiff actually discovered the defect.

Furthermore, the cracked and raised section of cement does not present an unreasonable risk of harm. Even when the facts are viewed in the light most favorable to plaintiff, she pleaded no facts that would create a genuine issue of material fact as to whether the risk of danger presented by the cracked and raised section of cement was open and obvious or whether it presented an unreasonable risk of harm. Accordingly, summary disposition was appropriate.

Affirmed.

/s/ Michael R. Smolenski
/s/ Gary R. McDonald
/s/ Martin M. Doctoroff