STATE OF MICHIGAN

COURT OF APPEALS

PHYLLIS GILES,

Plaintiff-Appellant,

v

MANAGEMENT SYSTEMS, INC.,

Defendant-Appellee.

UNPUBLISHED
September 23, 2004

No. 247450
Wayne Circuit Court
LC No. 02-202174-NO

Before: Cavanagh, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right the summary dismissal of her trip and fall case, pursuant to MCR 2.116(C)(10), on the ground that the fence she tripped on was open and obvious. We affirm.

On appeal, plaintiff contends that the fence section was not open and obvious because it was lying flat on the ground and concealed by high grass. After de novo review, and considering the documentary evidence in a light most favorable to plaintiff, we disagree. See *Ritchie-Gamester v Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999); *Spiek v Dep't of Transportatio*n, 456 Mich 331, 337; 572 NW2d 201 (1998).

It is undisputed that plaintiff, as a resident of defendant's apartment complex, was an invitee. Thus, defendant owed her a duty of reasonable care to protect her from an unreasonable risk of harm caused by a dangerous condition on the land, but this duty does not encompass open and obvious dangers. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). The issue here is whether the fallen section of fence was an "open and obvious" danger, i.e., one that was visible or apparent upon casual inspection to a reasonable person of average intelligence regardless of whether plaintiff, in fact, saw the danger. *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997).

Plaintiff admitted that after she fell she saw the six-foot by six-foot wrought iron fence and likely did not see it before the fall because she was looking ahead and carrying a small bag of yard debris in her arms. She also testified that she knew that section of fence had fallen to the ground some time between September 1999 and the date of this incident, November 14, 1999, and that people had walked through the opening. Plaintiff also testified that the grass had been cut by defendant in October. Viewing this evidence in a light most favorable to plaintiff, we conclude that a reasonable person in plaintiff's position, with knowledge of the existence of the

fallen fence, would have foreseen the danger of tripping over it. Further, this avoidable condition did not create an unreasonable risk of harm so as to remove the condition from the open and obvious doctrine. See *Lugo*, *supra* at 518-519. Accordingly, summary dismissal was properly granted because plaintiff failed to establish a prima facie case of negligence.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Donald S. Owens