STATE OF MICHIGAN

COURT OF APPEALS

MARY ANN ZOPPA,

Plaintiff-Appellant,

v

GREAT LAKES PROPERTY GROUP TRUST, d/b/a/ OXFORD PLACE APARTMENTS,

Defendant-Appellee.

UNPUBLISHED
November 2, 2004

No. 249338
Kent Circuit Court
LC No. 02-003982-NI

Before: Neff, P.J., and Smolenski and Schuette, JJ.

PER CURIAM.

Plaintiff in this premises liability action appeals as of right from an order granting defendant's motion for summary disposition. We reverse and remand.

We review de novo a trial court's decision to grant or deny summary disposition. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). Under MCR 2.116(C)(10), summary disposition is appropriate when there is "no genuine issue as to any material fact" and this Court is liberal in finding such issues. *Marlo Beauty Supply, Inc v Farmers Ins Group of Cos*, 227 Mich App 309, 320; 575 NW2d 324 (1998), citing *Lash v Allstate Ins Co*, 210 Mich App 98, 101; 532 NW2d 869 (1995). A question of material fact exists "when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In deciding a motion under this rule, the trial court must consider "the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party." *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

The instant case stems from an accident that occurred at an apartment complex owned by defendant. Plaintiff, a resident of the complex, was walking her dog[1] in a grassy area designated for this purpose. As she walked, she tripped in a hole, fell, and broke her kneecap. The accident

[1] Plaintiff testified at deposition that she paid an extra fee for the privilege of keeping pets in her apartment.

occurred at night and both plaintiff and her boyfriend testified at deposition that the lights in the dog walk area were not working.

"[T]enants are invitees of the landlord while in the common areas, because the landlord has received a pecuniary benefit for licensing their presence." *Stanley v Town Square Co-op*, 203 Mich App 143, 147; 512 NW2d 51 (1993). Thus, whether defendant is liable for plaintiff's injuries depends on the level of care that a landowner must exercise for the benefit of invitees.

Parties in possession of land generally have a duty to use reasonable care to protect invitees from unreasonable risks of harm caused by dangerous conditions on their premises. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). A landowner is subject to liability for physical harm caused to an invitee by a such a condition if he:

> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an *unreasonable* risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger. [*Id.*, quoting 2 Restatement Torts, 2d, § 343, pp 215-216; Emphasis added in *Bertrand*.]

In *Bertrand*, *supra* at 617, citing *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 497; 418 NW2d 381 (1988), the Court further stated, "If the proofs create a question of fact that the risk of harm was unreasonable, the existence of duty as well as breach become questions for the jury to decide." But a landowner's duty to protect or warn invitees does not generally extend to open and obvious dangers. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). Where an invitee has no actual knowledge of a hazardous condition, courts must determine whether an average person of ordinary intelligence would have discerned the risk "upon casual inspection." *Novotney v Burger King Corp* (*On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

In the instant case, no evidence exists to suggest that the hole plaintiff tripped in constituted an open and obvious hazard. Plaintiff testified that despite watching her step as she walked, she did not notice anything out of the ordinary before her fall. Similarly, her boyfriend stated that the hole had grass growing in it and was difficult to see unless one stood "straight on top of it." Although one of defendant's maintenance personnel testified that he was able to discover the location of the hole in less than a minute when he went to fill it in, he confirmed that it contained growth matching the surrounding area and admitted that he had failed to notice it on several previous occasions. Furthermore, defendant admits that, if a hazard existed, it was "extraordinarily subtle and difficult to discover."

This Court examined a similar scenario in *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 195; 600 NW2d 129 (1999), in which the plaintiff tripped over a raised portion of the sidewalk on the defendant's property. The defendant acknowledged that it had not noticed a dangerous condition at the site of the plaintiff's fall at any time before her accident. *Id.* In denying the plaintiff's motion for a new trial on the grounds that the verdict went against the

great weight of the evidence, this Court stated, "Whether the uneven sidewalk presented an unreasonable danger was a factual question for the jury to decide." *Id.* at 195.

Like the sidewalk in *Ellsworth*, whether the hole that plaintiff tripped in created an unreasonable risk of harm presented a question of fact for a jury. Reasonable minds might disagree as to whether the hidden condition was dangerous and whether defendant should have discovered it through reasonable inspection. Consequently, a genuine issue of material fact exists and we reverse the trial court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10).

Nevertheless, defendant contends that as a matter of law, the hole did not present an unreasonable risk of harm. In support of this position, it cites *Lugo*, *supra*, at 519-520, in which our Supreme Court held that a pothole in a parking lot did not create an unreasonable risk of harm. Defendant's reliance on *Lugo* is misplaced. Rather than determining whether a hidden condition presented an unreasonable risk, the Court in *Lugo* recognized that open and obvious conditions can create an unreasonable risk of harm. *Id.* at 519. In such cases, landowners are liable even for open and obvious hazards where there exist "special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided." *Id.* One such special aspect occurs when the open and obvious condition imposes "an unreasonably high risk of severe harm." The Court provided the example of an unguarded thirty-foot pit in the middle of a parking lot to illustrate this point. *Id.* at 519, n 2. Although the shallow hole in the instant case probably would not meet this standard if it had been open and obvious, there is no dispute on that issue. Because the hole was hidden, reasonable minds might disagree as to whether it created an unreasonable risk of harm, and summary disposition was inappropriate.

Reversed and remanded. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Michael R. Smolenski