# STATE OF MICHIGAN

# COURT OF APPEALS

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JEANNE SIEGEL,

Plaintiff-Appellant,

V

ORCHARD MALL, LLC,

Defendant-Appellee.

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UNPUBLISHED
October 27, 2005

No. 263209
Oakland Circuit Court
LC No. 04-059274-NO

Before: Gage, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition in this premises liability case. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On December 11, 2003, plaintiff and her daughter-in-law were walking to a restaurant located on defendant's premises. Plaintiff placed her foot on a curb, stepped up with her other foot, and tripped on a crack in the sidewalk and fell against a window of the restaurant.

Plaintiff filed suit alleging that defendant negligently failed to maintain the premises in a reasonably safe condition and to warn of the unsafe condition. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that it owed no duty to plaintiff because the condition was open and obvious, and presented no special aspects that made it unreasonably dangerous in spite of its open and obvious nature. The trial court agreed and granted the motion.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it for himself. *Id*. at 609-610.

The open and obvious danger doctrine attacks the duty element that a plaintiff must establish in a prima facie negligence case. See *id*. at 612. Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On*

*Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). The test is objective. A court must look to whether a reasonable person would have foreseen the danger, and not whether the particular plaintiff should have known that the condition was hazardous. *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002). If special aspects of a condition make even an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions to protect an invitee from that risk. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001). If such special aspects are lacking, the open and obvious condition is not unreasonably dangerous. *Id*. at 517-519.

On the basis of the foregoing principles, we affirm the trial court's grant of summary disposition. If a defect creates a risk of harm solely because the plaintiff failed to notice it, the open and obvious danger doctrine eliminates the property owner's liability if the plaintiff should have discovered the defect and realized its danger. *Bertrand*, *supra* at 611. Here, the sidewalk onto which plaintiff attempted to step was not covered by snow or ice, and was dry. No evidence showed that anything obstructed plaintiff's view of the sidewalk. The fact that plaintiff did not notice a defect in the sidewalk before her fall is irrelevant. *Joyce*, *supra*. The trial court did not err in concluding that no issue of fact existed as to whether the condition of the sidewalk was open and obvious.

Furthermore, no special aspects made the condition unreasonably dangerous in spite of its open and obvious nature. The fact that plaintiff was not looking at the area in which she was walking was not a condition of the sidewalk itself. Ordinary defects in pavement do not create an unreasonable risk of harm or an unusually high likelihood of injury because a prudent person would be able to observe and avoid the defects, and would be unlikely to sustain a severe injury by tripping and falling to the ground. *Lugo*, *supra* at 520, 523.[1] Had plaintiff watched her step, any risk of harm would have been obviated. Summary disposition in favor of defendant was, therefore, appropriate.

Affirmed.

/s/ Hilda R. Gage
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray

[1] This is so even though plaintiff here suffered a more severe injury than might have been expected under the circumstances.