STATE OF MICHIGAN

COURT OF APPEALS

JAN C. JEPSON, Personal Representative of the Estate of BERNARDINE ANNE BUTLER,

Plaintiff-Appellant,

v

EDWARD F. SPARROW HOSPITAL ASSOCIATION,

Defendant-Appellee.

UNPUBLISHED
January 24, 2008

No. 275748
Ingham Circuit Court
LC No. 06-000227-NO

Before: Bandstra, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

In this premises liability action, defendant appeals by leave granted from the circuit court's order denying its motion for summary disposition. Because a reasonable factfinder could only conclude that the danger presented was open and obvious and contained no special aspects, we reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff tripped and fell when she stepped on an expansion joint in defendant's parking structure. The expansion joint has a uniform channel or depression running along its length that is less than four inches wide and roughly one inch deep. The trial court denied defendant's motion for summary disposition on the ground that a question of fact existed regarding whether the danger created by the expansion joint was open and obvious. MCR 2.116(C)(10).

This Court reviews a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

Generally, an invitor's duty to protect invitees does not extend to the removal of open and obvious dangers. *Ghaffari v Turner Construction Co*, 473 Mich 16, 21-22; 699 NW2d 687 (2005). However, if there are special aspects "that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm," then an invitor does have a duty to undertake reasonable precautions to protect invitees. *Lugo v Ameritech Corp*, 464 Mich 512,

517; 629 NW2d 384 (2001). Only special aspects "that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided" will place a condition outside the open and obvious danger doctrine. *Id*. at 519. *Lugo* specifically identified two possible special aspects: unavoidability and potential for death or serious injury. *Id*. at 518. The particular circumstances of a plaintiff are not relevant to the inquiry of whether a danger is open and obvious. Rather, a danger is open and obvious if it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger on casual inspection. *Teufel v Watkins*, 267 Mich App 425, 427; 705 NW2d 164 (2005).

The photographic evidence shows a minor irregularity in the walking surface of a parking structure. In *Lugo*, our Supreme Court concluded that the open and obvious defense applied to a slip-and-fall involving a pothole in a parking lot. *Lugo*, *supra* at 520. Helpful also to our analysis is the Legislature's enactment of MCL 691.1042a(2), commonly known as the two-inch rule, restoring immunity to municipalities for injuries caused by sidewalk defects less than two inches in height. While inapplicable in a private action such as the instant one, the statute suggests a legislative determination that no liability should follow from small defects in walking surfaces. Because the irregularity in this case is less than four inches wide and only about one inch deep, an average person of reasonable intelligence who was paying minimal attention would be able to step over, or even on, the expansion joint without significant risk.

Plaintiff fails to show that the expansion joint was not open and obvious, or that special aspects existed that would make the open and obvious defense inapplicable. Plaintiff's statements that the expansion joint's color "is virtually the same . . . as" and "close to" the color of the surrounding concrete are plainly contradicted by the parties' photographic exhibits. If, per *Lugo*, potholes in parking lots are open and obvious, in that an ordinarily prudent person should be able to see and avoid them, then the expansion joint in this parking structure must also be open and obvious. Further, although potholes might be considered defects in pavement requiring repair, expansion joints are not defects in the same sense. In fact, plaintiff does not suggest that the joint needed repair or that its design was flawed. The trial court erred in concluding that a question of fact existed regarding whether the expansion joint was open and obvious.

With respect to special aspects, plaintiff's argument based on plaintiff's husband's deposition testimony that the lighting was "questionable" at approximately 3:15 p.m. on an August afternoon is not the same as explicitly arguing that the area was dimly lit. Even if the area were dimly lit, however, it would not modify the situation regarding the expansion joint so as to "give rise to a uniquely high likelihood of harm or severity of harm." *Lugo, supra* at 519. Thus, the questionable lighting does not rise to the level of a special aspect. Similarly, the parking structure's lack of a separate pedestrian route cannot reasonably be seen as a special aspect creating a uniquely high likelihood of harm, under *Lugo, supra*, but rather is a normal aspect of parking garages in general. And the absence of precautionary paint for a putative hazard that is assumed, in the first instance, to be open and obvious cannot be seen as a special circumstance.

For comparison purposes, we refer to *Lugo, supra*, where our Supreme Court presented the hypothetical situation of a wet floor in a commercial building whose only exit required traversing the wet surface. *Lugo, supra* at 518. The hazardous condition of the wet floor was open and obvious, but unavoidability nonetheless created an unreasonably dangerous situation. *Id*. Here, the expansion joint was not unavoidable in the same sense as the wet floor in the *Lugo*

hypothetical because a person could avoid an expansion joint by simply stepping over it. In sum, the alleged unavoidability in the case of the expansion joint is not a special aspect that removed the joint from application of the open and obvious doctrine.

Reversed and remanded for entry of an order of summary disposition in favor of defendant. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto