STATE OF MICHIGAN

COURT OF APPEALS

FLORENCE BAKER, Plaintiff-Appellant,	UNPUBLISHED April 15, 2008
v	No. 275499 Wayne Circuit Court
TENDERCARE (MICHIGAN), INC., d/b/a WAYNE TOTAL LIVING CENTER, Defendant-Appellee.	LC No. 05-525740-NO

Before: White, P.J., and Hoekstra and Schuette, JJ.

PER CURIAM.

Plaintiff appeals by delayed leave granted from an order granting defendant's motion for summary disposition. We affirm.

I. FACTS

This negligence action arises out of an injury incurred by plaintiff when she tripped and fell while walking through defendant's nursing home facility parking lot. Plaintiff was visiting her mother at defendant's nursing home at the time the injury occurred. Plaintiff had been visiting her mother at this facility for approximately three years, one or two times a week. For over a year before the injury, plaintiff always parked on one side of the parking lot because the concrete on the other side of the lot was "broken" and "holey." She did not notice any problems with the concrete on the side of the lot on which she parked and on which she was injured.

On April 8, 2005, plaintiff visited her mother at about 11:00 a.m. The weather was clear and dry. Plaintiff did not notice any cracks on her way into the facility. While returning to her car, plaintiff stepped on a crack in the parking lot, which to her seemed as if it would be harmless. When she stepped on the crack, the cement "gave way underneath [her] foot," and she "felt [her] foot go down [and] heard a [gravelly] sound and it caught [her] foot." Plaintiff's foot then became stuck, she stumbled and fell, hitting her head on the side of her car and falling to the ground. Plaintiff never looked at the section of pavement that caused her to trip and fall. She testified that she was disoriented after the fall and may have lost consciousness.

As a result of her fall, plaintiff suffered a broken wrist and "other physical injuries." Plaintiff filed a complaint in Wayne Circuit Court on August 31, 2005, against defendant, alleging negligent maintenance of, and failure to warn of unreasonable hazards in, its parking lot.

On June 30, 2006, defendant moved for summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10), arguing that the pavement defect that caused plaintiff's fall was open and obvious. The trial court granted defendant's motion for summary disposition based on plaintiff's failure to create a genuine issue of material fact. The court specifically cited case law regarding the open and obvious doctrine. With respect to plaintiff's testimony, the court opined that it "sound[ed] really suspect," and stated, "If I [were] the fact finder, I would find [plaintiff's description of the latent defect] difficult to accept. Plaintiff now appeals.

II. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005). When reviewing a motion for summary disposition under MCR 2.116(C)(10), this Court must consider the record in the same manner as the trial court. *Id.* We must consider all the pleadings and the evidence in a light most favorable to the nonmoving party and may not weigh the evidence or make factual findings. *Id.* If there is any conflict in the evidence, summary disposition is improper. *Id.*

Further, our Supreme Court has emphasized that the nonmoving party may not rely on mere allegations but must present documentary evidence establishing that an issue of material fact exists. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations, . . . but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Id.* Here, plaintiff would have the burden at trial to prove that the pavement defect was not open and obvious. See *Novotney v Burger King Corp* (*On Remand*), 198 Mich App 470, 475; 499 NW2d 379 (1993).

III. ANALYSIS

In a premises liability action, the plaintiff must prove (1) the defendant owed the plaintiff a duty, (2) the defendant breached the duty, (3) the breach caused plaintiff injury, and (4) the plaintiff suffered damages. *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007). "[A] premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp,* 464 Mich 512, 516; 629 NW2d 384 (2001). This duty does not, however, extend to dangerous conditions that are open and obvious. *Id.* An open and obvious condition is one that an average person of ordinary intelligence would be able to discover upon casual inspection. *Kennedy*, *supra* at 713. Thus, it is an objective test unrelated to the actual perceptions of a particular plaintiff. *Id.*

Defendant argues that plaintiff admitted that she never *saw* the crack that caused the fall, and therefore, failed to present evidence that the crack was not open and obvious. Plaintiff argued that her perception of the crack was not limited to her vision because she *felt* the pavement crumble under foot, creating a depression that caught her foot and caused her to fall. Neither party has produced any photographs of the disputed area in the condition that caused the fall. Defendant, however, has presented photographs of other sections of the pavement with plainly visible cracks and other defects. Plaintiff testified that she was familiar with the deteriorating condition of the parking lot in general and, in fact, chose to park in this area of the

parking lot for that very reason. Plaintiff also does not dispute that the crack in the pavement was plainly visible, but claims that it was "harmless." But the condition of the parking lot suggests that, under an objective test, an invitee of ordinary intelligence would have suspected that these cracks might not be harmless. See *Kennedy*, *supra* at 713. Just because the defect is hidden does not also mean that it is not discoverable by the average user. For example, in *Ververis v Hartfield Lanes* (*On Remand*), 271 Mich App 61, 65; 718 NW2d 382 (2006), this Court held that ice covered by snow may be open and obvious if the circumstances suggest that a reasonable invitee would have suspected the presence of the ice. Similarly here, an average person of ordinary intelligence might reasonably conclude from the overall condition of the concrete that the cracks present were a result of the defective nature of the concrete and may in fact crumble or deteriorate when stepped on.

Plaintiff presents no other documentary evidence in support of her description of the pavement. Plaintiff's contemporaneous description of the event made no mention of crumbling concrete. Plaintiff's mere allegation in her complaint, that the hole in which her foot got stuck was not visible, is not enough to raise a genuine issue of material fact regarding whether the danger presented was open and obvious.[1]

Plaintiff also argues that the trial court's comments regarding the credibility of her version of the accident require reversal. We disagree.

The trial court may not weigh the credibility of witness testimony when evaluating a motion for summary disposition. *Hines*, *supra* at 437. Here, referring to plaintiff's version of the accident, the trial court commented, "If I [were] a fact finder, I would find that difficult to accept." However, because the trial court spoke in hypothetical terms and did not grant the motion based on its credibility determination, we find no error requiring reversal.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Bill Schuette

---

[1] To support her argument that the condition of the parking lot was not open and obvious, plaintiff refers this Court to its decision in *Cartwright v Rite Aid of Michigan, Inc*, unpublished opinion per curiam of the Court of Appeals, issued March 15, 2007 (Docket No. 272691). However, *Cartwright* is an unpublished opinion; therefore, it has no precedential value. MCR 7.215(C)(1). Further, *Cartwright* is factually distinguishable from the instant action. In *Cartwright*, the plaintiff and a witness testified that there was nothing observably wrong with the curb before plaintiff stepped onto it and it crumbled. Here, there was a noticeable defect—a crack in the pavement—that plaintiff was aware of, but she stepped on it anyway because she thought it was harmless.