STATE OF MICHIGAN

COURT OF APPEALS

STACEY R. COLEMAN, Plaintiff-Appellant,	UNPUBLISHED June 29, 2010
v	No. 288878 Oakland Circuit Court
APPLEBEE'S OF MICHIGAN, INC., Defendant-Appellee, and	LC No. 2008-088486-NO
ROSS PROPERTIES, INC., Defendant.	

Before: WHITBECK, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

Plaintiff Stacey Coleman appeals as of right the trial court's order granting summary disposition in favor of defendant Applebee's of Michigan, Inc. pursuant to MCR 2.116(C)(10).[1] We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

This action arises out of injuries sustained by Coleman in March 2005, when she fell in an Applebee's parking lot in Madison Heights. Coleman went to the Applebee's restaurant with her friend Jean Roye, Jean Roye's daughter Amy Roye, and Jean Roye's granddaughter Alyssa, to celebrate Alyssa's birthday. They arrived together around 6:30 p.m., parked in the adjacent parking lot, and walked to the restaurant past the curb where Coleman would later fall. It was still light out when they arrived.

The party ate dinner and, after an hour or an hour and a half, left the restaurant. They exited the restaurant through the front door and found that it was dark outside. Jean and Amy Roye walked ahead with Coleman and Alyssa behind them. Alyssa was tired, so Coleman

[1] Coleman initially brought claims against both Applebee's and Ross Properties. But Coleman dismissed her claim against Ross Properties before discovery and the grant of summary disposition to Applebee's.

picked her up and carried her. It was dark outside and hard to see. As Coleman was walking around an island in the parking lot, she noticed that there were rocks in the middle of the island but did not see whether there was also a light in the middle of the island. Coleman was periodically looking down when her left shoe got caught in a crack in the pavement adjacent to the island, and she tripped and fell. Coleman did not see the crack before falling. Alyssa fell with Coleman. Coleman twisted her right ankle and heard a snap during the fall. She also injured her left knee. After the fall, Jean and Amy Roye helped Coleman into the car and drove her to Jean Roye's house where Coleman spent the night.

There is disagreement regarding whether there was artificial lighting in the parking lot at the time of Coleman's fall. Coleman, Jean Roye, and Amy Roye claimed that it was dark at the time of Coleman's fall; however, none of them knew for certain whether a light was burnt out in the immediate area. In contrast, Applebee's manager, Brian David Kaiser, claimed that he and other managers inspected the lights in the parking lot on a weekly basis. If the lights were out, he would have ordered them to be replaced. And there was no order form requesting a light replacement from February 22, 2005, to May 3, 2005. The General Manager, Lori Jo Erickson, also inspected the lights in the parking lot on a weekly basis and testified that the lights were regularly changed if they were burnt out. Jerome Eck, a consulting engineer, inspected the premises and found that there are three lights on the light post in the middle of the island and that there would have been at least two lights on even if one was burnt out.

In January 2008, Coleman filed her complaint, alleging negligent maintenance of the parking lot including the failure to warn invitees of a dangerous condition. Applebee's moved for summary disposition, pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10). Applebee's argued that Applebee's did not owe a duty to Coleman to protect her against the crack in the sidewalk because it was an open and obvious condition without any special aspects. Coleman responded, arguing that testimony that it was dark at the time of the fall was sufficient to establish a genuine issue of fact regarding whether the condition was open and obvious, and, even if the crack in the sidewalk was open and obvious, the darkness made the condition unreasonably dangerous.

After a hearing on the motion, the trial court disagreed with Coleman and found that the crack was open and obvious—that an average user with ordinary intelligence would have been able to discover the crack on casual inspection. In particular, the trial court found that there was no definite proof that the lights were not working and, even if the lights were not working, Coleman should have been more careful as a result of the darkness. Therefore, the trial court granted Applebee's motion for summary disposition. Coleman now appeals.

II. OPEN AND OBVIOUS

A. STANDARD OF REVIEW

Coleman argues that there is a genuine issue of material fact regarding whether the crack was an open and obvious condition because it was dark and there was no artificial illumination when she fell.

Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to

judgment as a matter of law. The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence.[2] The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.[3] We review de novo the trial court's ruling on a motion for summary disposition.[4]

B. BASIC LEGAL PRINCIPLES

To demonstrate a prima facie case for negligence, a plaintiff must show 1) a duty, 2) breach of that duty, 3) causation, and 4) damages.[5] A premises owner owes a duty to an invitee to take reasonable care to protect against any known dangers on the premises.[6] However, a premises owner need not warn invitees of open and obvious dangers, unless special aspects of the condition make the risk unreasonably dangerous.[7] The standard for determining whether something is open and obvious is whether "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection."[8] Special aspects occur when an open and obvious condition creates "an unreasonable risk of harm."[9]

C. APPLYING THE PRINCIPLES

The Michigan Supreme Court has held that potholes in a parking lot are generally open and obvious.[10] Potholes are a common occurrence that an average person with ordinary intelligence would notice one upon casual inspection.[11] Thus, like the pothole in *Lugo v Ameritech Corp*, the crack here would, generally, be presumed open and obvious.

Coleman argues, however, that the crack at issue was not open and obvious because it was dark at the time of her fall and no average person could have seen the crack under the circumstances upon casual inspection. Indeed, this Court has held that darkness may render a danger, which is open and obvious in the daylight, not open and obvious, if an average person could not see it under the circumstances upon casual inspection.[12]

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[2] MCR 2.116(G)(3)(b) and (4); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

[3] MCR 2.116(G)(5); *Maiden*, 461 Mich at 120.

[4] *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 48; 742 NW2d 622 (2007).

[5] *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007).

[6] *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001).

[7] *Id.* at 516-517.

[8] *Slaughter v Blarney Castle Oil*, 281 Mich App 474, 478; 760 NW2d 287 (2008), quoting *Novotney v Burger King Corp*, 198 Mich App 470, 475; 499 NW2d 379 (1993) (alteration by *Slaughter*).

[9] *Lugo*, 464 Mich at 517.

[10] *Id.* at 521.

[11] See *id.* at 523 ("[P]otholes in pavement are an 'everyday occurrence' that ordinarily should be observed by a reasonably prudent person.").

[12] See *Abke v Vandenberg*, 239 Mich App 359, 362-363; 608 NW2d 73 (2000).

Coleman testified that she could not see the crack before the fall because it was dark and hard to see. Jean Roye corroborated Coleman's testimony. But the group passed the island when it was still light out, so Coleman should have seen the area where the crack was located prior to her fall. Moreover, Coleman testified that she was able to see the island and the presence of rocks in the middle of the island, and she could see the parked cars in the lot immediately before her fall. In addition, after falling, Coleman could see the crack in the curb. Similarly, Jean and Amy Roye also testified that they could see the crack after Coleman's fall.

Based on the evidence, it seems likely that an average person of ordinary intelligence would have seen the crack, which was large enough for Coleman's shoe to get caught in, upon casual inspection. In addition, neither Coleman, Jean Roye, nor Amy Roye could definitively say that the lights were not working in the parking lot at the time of Coleman's fall.[13] Kaiser and Erickson testified that if a light had been out, it would have been quickly changed based on daily and weekly inspections. Therefore, even viewing the evidence in the light most favorable to Coleman, we conclude that there was no genuine issue of material fact, despite the darkness, that the crack was open and obvious.

Furthermore, the condition at issue here contained no special aspects. In *Lugo*, the Supreme Court provided two examples of special aspects of an open and obvious condition that create an unreasonable risk of harm.[14] First, an open and obvious condition creates an unreasonable risk of harm if the condition would be unavoidable, such as "a commercial building with only one exit for the general public where the floor is covered with standing water."[15] Second, an open and obvious condition creates an unreasonable risk of harm if there is a high risk that the condition would cause severe harm, such as "an unguarded thirty foot deep pit in the middle of a parking lot."[16]

In this case, the crack at issue was avoidable and was unlikely to cause severe harm. Coleman could have taken a different path around the crack following Jean Roye and Amy Roye. Moreover, cracks in sidewalks are a common occurrence, and they generally do not cause severe harm. Therefore, there is no genuine issue of material fact regarding whether the crack was open and obvious, or whether special aspects exist, and the trial court did not err.

We affirm.

/s/ William C. Whitbeck
/s/ Patrick M. Meter

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[13] *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 192-193; 540 NW2d 297 (1995) (stating that conjectures and speculations are not sufficient to create a question of fact for the jury).

[14] *Lugo, supra* at 518.

[15] *Id.*

[16] *Id.*