STATE OF MICHIGAN

COURT OF APPEALS

ROBIN WHITE, Plaintiff-Appellant,	UNPUBLISHED October 17, 2017
v	No. 333390 Oakland Circuit Court
MIRHAR REALTY, LLC, Defendant-Appellee.	LC No. 2015-145997-NO

Before: SAAD, P.J., and CAVANAGH and CAMERON, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals the trial court's order that granted summary disposition in favor of defendant. Because the hazard at issue is open and obvious, we affirm.

Sometime between 11:00 a.m. and 12:00 p.m. on June 15, 2014, plaintiff stopped and parked her van at a strip mall located near the intersection of 12 Mile Road and Telegraph Road so she could purchase some bagels. After she purchased her bagels and returned to her van, she noticed that the strip mall also contained a Starbucks.[1] Plaintiff then got out of her van and headed down the sidewalk toward the Starbucks. As she walked along the sidewalk, two individuals were walking toward plaintiff. In response, plaintiff walked toward the "inside" of the sidewalk, closer to the building. According to plaintiff, the "[n]ext thing [she] knew," her toe hit something, which caused her to trip and fall. Plaintiff confirmed that there had been nothing blocking her vision at the time of the incident and that the lighting in the area was good.

During her deposition, defendant's counsel asked plaintiff, "What did you trip on?" Plaintiff replied, "At the time I didn't know. Once I was done I realized it was the sidewalk." Specifically, she tripped on "an elevation in the slab," which she noticed after she fell. Defendant's counsel asked plaintiff if she looked down, and she responded, "Well, when you're looking out when you're walking your eyes go up and down, but I would not have -- did not see

[1] The strip mall consisted of three separate "buildings," of which the building with the Starbucks, where the accident occurred, was owned by defendant.

it." Defendant's counsel asked plaintiff if she saw it afterwards, and plaintiff replied that she did.

During her deposition, plaintiff reviewed various photographs of the sidewalk at the site of the incident. Defendant's counsel showed plaintiff a photograph of an expansion joint between two pieces of the sidewalk and then asked her if she thought "that gap or expansion joint [had] anything to do with your fall?" Plaintiff replied, "[T]he only thing I can say is, I didn't see that." The photographs taken by one of plaintiff's expert witnesses indicate that the height differential between the two pieces of the sidewalk at the expansion joint ranged from $^{5}/_{16}$ to $^{7}/_{16}$ inches.

Plaintiff filed suit against defendant and alleged premises liability.[2] The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) because it agreed that the hazard was open and obvious.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013). "A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of the plaintiff's claim and should be granted, as a matter of law, if no genuine issue of any material fact exists to warrant a trial." *Doe v Henry Ford Health Sys*, 308 Mich App 592, 596-597; 865 NW2d 915 (2014). "When evaluating a motion for summary disposition under MCR 2.116(C)(10), 'a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion.' " *Innovation Ventures, LLC v Liquid Mfg, LLC*, 499 Mich 491, 507; 885 NW2d 861 (2016), quoting *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The motion is properly granted "if there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law." *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001).

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Benton v Dart Props, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006). The specific duty that a landowner owes to those who enter the landowner's land is determined by the status of the visitor. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). There is no question that plaintiff was an invitee at the time of the accident. "With regard to invitees, a landowner owes a duty to use reasonable care to protect invitees from unreasonable risks of harm posed by dangerous conditions on the owner's land." *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012) (footnote omitted). However, this duty does not require a landowner to protect an invitee from dangers that are open and obvious. *Benton*, 270 Mich App at 440-441. Open and obvious dangers cut off a landowner's duty because "there is an overriding public

[2] Plaintiff's complaint included counts of premises liability and ordinary negligence, but because her alleged harm "arose from an allegedly dangerous condition on the land," the claim sounds solely in premises liability. *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 692; 822 NW2d 254 (2012).

policy that people should 'take reasonable care for their own safety' and this precludes the imposition of a duty on a landowner to take extraordinary measures to warn or keep people safe unless the risk is unreasonable." *Buhalis*, 296 Mich App at 693-694, quoting *Bertrand v Alan Ford, Inc*, 449 Mich 606, 616-617; 537 NW2d 185 (1995).

"The standard for determining if a condition 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.' " *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 478-479; 760 NW2d 287 (2008), quoting *Novotney v Burger King Corp*, 198 Mich App 470, 475; 499 NW2d 379 (1993). Because the test is objective, "we look not to whether plaintiff should have known that the [condition] was hazardous, but to whether a reasonable person in [her] position would foresee the danger." *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997).

Plaintiff contends that the trial court erred when it found that the hazard was open and obvious because it incorrectly thought she stated in her deposition testimony that she did not see the hazard "because she was looking straight ahead." During her deposition, defendant's counsel asked plaintiff if she looked down while she was walking on the sidewalk, and plaintiff responded, "Well, when you're looking out when you're walking your eyes go up and down, but I would not have -- did not see it." Thus, it is apparent that plaintiff did not consciously look down as she was walking. Instead, her testimony reflects that in the process of "looking out," she may have glanced up and down. Hence, we see no error in the trial court's statement. But in any event, plaintiff's reliance on whether she looked down is misplaced. As we have already noted, the test of whether a hazard is open and obvious is objective. Here, the photographs of the alleged defect clearly depict a slight height differential at the expansion joint between the two pieces of sidewalk, which is readily visible against the brick exterior of the buildings that were adjacent to the sidewalk. We discern nothing that would prevent an ordinary person with average intelligence from observing this condition.[3]

[3] Plaintiff's reliance on her expert witness, Steven Ziemba, who claimed in an affidavit that the height differential between the cement slabs was not open and obvious, is misplaced. First and foremost, while it is conceivable that expert testimony could aid in the determination of whether a particular hazard is open and obvious if the situation is somewhat unique or uncommon, see, e.g., *Pippin v Atallah*, 245 Mich App 136, 144; 626 NW2d 911 (2001) (noting that expert testimony was used for situation involving chains strung across a parking lot), that is not the case here. Indeed, MRE 702 provides that expert testimony can be considered if "scientific, technical, or other specialized knowledge will assist the trier of fact." But no such knowledge would assist the trier of fact when everyone has experience interacting with ubiquitous, adjoining cement sidewalk slabs and their differing heights. See *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 338; 657 NW2d 759 (2002) (stating that when the jury and an expert "are equal in their abilities" to make a determination, the expert's testimony is not proper). Second, Ziemba provided nothing other than conclusory statements in his affidavit, which is insufficient to create a genuine issue of fact for summary disposition purposes. See *Kozak v City of Lincoln Park*, 499 Mich 443, 468; 885 NW2d 443 (2016).

Plaintiff also contends that, assuming the hazard was open and obvious, the doctrine should not apply because the height differential between the two slabs of sidewalk imposed an unreasonable risk of harm. It is true that if there are "special aspects" that make an open and obvious condition "unreasonably dangerous," then the premises possessor's duty to warn or repair remains intact. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001). There are two types of special aspects that will render an otherwise open and obvious hazard actionable: the hazard is "effectively unavoidable' or poses "an unreasonably high risk of severe harm." *Id.* at 518. Neither aspect is present here.[4] Indeed, our Supreme Court has stated that "neither a common condition nor an avoidable condition is uniquely dangerous." *Hoffner*, 492 Mich at 463, citing *Lugo*, 464 Mich at 520, and *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 8-9; 649 NW2d 392 (2002). As the Michigan Supreme Court explained, "typical open and obvious dangers (such as ordinary potholes in a parking lot) do not give rise to these special aspects," in part because "there is little risk of severe harm" and therefore, "it cannot be expected that a typical person tripping on a pothole and falling to the ground would suffer severe injury." *Lugo*, 464 Mich at 520. Consequently, "steps and differing floor levels, such as the uneven pavement that result[s] when [a] section of sidewalk [is] removed, are 'not ordinarily actionable *unless unique circumstances surrounding the area in issue made the situation unreasonably dangerous*.' " *Weakley v City of Dearborn Hts*, 240 Mich App 382, 385; 612 NW2d 428 (2000) (emphasis altered), quoting *Bertrand*, 449 Mich at 614, remanded for reconsideration on other grounds 463 Mich 980 (2001).

Here, the slight height differential located at an expansion joint of the sidewalk is a common condition, and such common conditions are not uniquely dangerous. *Hoffner*, 492 Mich at 463. Further, a pedestrian that falls due to a height differential at an expansion joint of a sidewalk only faces a fall of several feet towards to the ground; in that situation, "it cannot be expected that a typical person tripping . . . and falling to the ground would suffer severe injury." *Lugo*, 464 Mich at 520. Accordingly, we hold that as a matter of law there was no unreasonable risk of harm from the differing levels of sidewalk, and as a result, the open and obvious doctrine applied in full force.

Plaintiff's reliance on her expert witnesses, once again, is misplaced. Plaintiff contends that the opinions of her expert witnesses demonstrate that the alleged defect was a dangerous condition. We disagree.

First, plaintiff relies on a report authored by an architectural expert witness, Lee A. Martin, who concluded that defendant violated the Michigan Building Code by maintaining a sidewalk that contained an abrupt change in elevation that was greater than $^1/_4$ inch in a required means of egress. While the "violation of an ordinance may be some evidence of negligence, it is not in itself sufficient to impose a legal duty cognizable in negligence." *Summers v Detroit*, 206 Mich App 46, 52; 520 NW2d 356 (1994); see also *Corey*, 251 Mich App at 9 n 2 ("With regard to the building code violation allegation in this case, we note that the absence of a handrail deals

[4] Plaintiff does not argue that the area of the sidewalk was unavoidable—only that it posed a risk of unreasonable harm.

with proximate causation. Because a duty did not exist in this case because of the open and obvious condition and the lack of a special aspect, we need not reach this issue"). Therefore, assuming without deciding that defendant violated the Michigan Building Code, such a violation would only be pertinent evidence of negligence if plaintiff had demonstrated that defendant owed her a duty in the first place. But for the reasons discussed above, defendant did not owe plaintiff a duty to protect her from the sidewalk condition.

Second, plaintiff relatedly contends that there was a genuine issue of material fact with regard to whether the alleged defect was a special aspect that posed an unreasonable risk of harm because Ziemba opined in his affidavit that the alleged defect was an unreasonably dangerous condition. But as discussed above, Ziemba's opinion is a mere conclusory statement, and further, there was no showing that he had any specialized knowledge to support his opinions as to whether the alleged defect presented an unreasonable risk of harm. See *Keywell*, 254 Mich App at 338.[5]

Affirmed. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Henry William Saad
/s/ Mark J. Cavanagh
/s/ Thomas C. Cameron

[5] Plaintiff also argues that the trial court erred when it held in the alternative that defendant did not have constructive notice of the alleged defect. But because of our resolution of the matter based on the open and obvious doctrine, this issue is moot and we need not address it. See *Ryan v Ryan*, 260 Mich App 315, 330; 677 NW2d 899 (2004).