STATE OF MICHIGAN

COURT OF APPEALS

KAREN LARSON,

Plaintiff-Appellant,

v

DANIEL TUCKER, doing business as DAN TUCKER PRODUCE,

Defendant-Appellee.

UNPUBLISHED
January 23, 2018

No. 335969
Branch Circuit Court
LC No. 15-100552-NI

Before: MARKEY, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

In this premises liability action, plaintiff, Karen Larson, appeals the trial court's order granting summary disposition pursuant to MCR 2.116(C)(10) (no genuine issue of material fact) in favor of defendant, Daniel Tucker, doing business as Dan Tucker Produce. We affirm.

In the early afternoon of May 23, 2015, Plaintiff was leaving defendant's market and carrying hanging plants that she purchased when she fell on a grate covering a drain in defendant's market. In her deposition testimony, plaintiff stated that the plants did not interfere with her view of where she was walking, that she was looking where she was going, and that she could see her feet because she was looking ahead. Plaintiff further testified that nothing prevented her from seeing the grate, that the metal grate appeared flush with the cement, and that "it looked like it was even." Plaintiff was wearing open-toed sandals that day, and according to plaintiff, she fell after the front of her sandal "caught on the piece of the metal that was laying on the top of the cement," referring to the grate covering the drain. Plaintiff testified that although the grate looked even, it actually was not. She further testified that there was water that prevented her from seeing that the grate was uneven. Defendant testified that the grate was "pretty much" even with the surrounding cement and that it appeared to be flush with the cement. Defendant also indicated that the grate fit snuggly, that he had never noticed it curling up or down, and that the grate "would give a little" if a person were to step on it.

Plaintiff filed the instant lawsuit alleging negligence and premises liability. Defendants filed a motion for summary disposition. The trial court granted defendant's motion for summary disposition, concluding that the metal grate was an open and obvious hazard because "the plaintiff was moving from one surface to another." On appeal, plaintiff argues that the

hazardous condition was not open and obvious because it was not readily apparent upon a casual inspection. We disagree.[1]

"Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). The court considering the motion "must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion." *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). All reasonable inferences are to be drawn in favor of the nonmovant. *Dextrom v Wexford Co*, 287 Mich App 406, 415; 789 NW2d 211 (2010).

To prevail on a premises liability claim, a plaintiff must prove the elements of negligence: duty, breach, causation, and damages. *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 693; 822 NW2d 254 (2012). "In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee[2] from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, the duty does not extend to open and obvious dangers. *Id*. at 517. In determining whether a danger is open and obvious, the question is whether "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Novotney v Burger King Corp*, 198 Mich App 470, 475; 499 NW2d 379 (1993). This is an *objective* standard, calling for an examination of the objective nature of the condition of the premises at issue." *Hoffner v Lanctoe*, 492 Mich 450, 461; 821 NW2d 88 (2012) (quotation marks and citation omitted).[3]

Based on our review of the photographs and testimony in the lower court record, we conclude that the grate was open and obvious. Plaintiff agrees that the photographs, which were taken soon after the accident, were accurate depictions of the drain area as it appeared at the time of her fall. The grate is a brown, rusty color, while the surrounding concrete is a gray color that is typical of an ordinary concrete slab. There are holes in the metal grate much like one would expect to see. The indentation in which the grate sits is also apparent. On the lower right side, it is evident that the edge of the grate does not meet the lip of the indentation in the concrete. The

---

[1] "This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. In making this determination, the Court reviews the entire record to determine whether defendant was entitled to summary disposition." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[2] In this case, the parties do not dispute that plaintiff was an invitee. Plaintiff was at defendant's market for the purpose of buying plants, and "invitee status is commonly afforded to persons entering upon the property of another for business purposes," *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000).

[3] On appeal, plaintiff does not argue that there was a special aspect to the condition, but only argues that it is open and obvious.

unfinished edge of the grate with small pieces of protruding metal on it is also clearly visible. According to plaintiff, she approached the grate from the side. Although plaintiff testified that there was water on the cement obscuring her view, she did not testify that there was a puddle of water or that the drain was completely covered by water.

Considering the difference in color between the grate and the surrounding cement, the visible holes and protrusions on the grate, and the relatively large size of the drain in defendant's building, an average user with ordinary intelligence could have discovered the grate and the accompanying risk of tripping after a casual inspection, *Novotney*, 198 Mich App at 475. Plaintiff's failure to realize the danger does not undermine the application of the open and obvious doctrine. Moreover, grates that cover water drains are common features on land that people ordinarily encounter and that are likely to present discontinuities in the walking surface.

Accordingly, the trial court did not err by granting defendant's motion for summary disposition where the danger was open and obvious.

Affirmed.

/s/ Jane E. Markey
/s/ Douglas B. Shapiro
/s/ Michael F. Gadola