STATE OF MICHIGAN

COURT OF APPEALS

SANDRA BIRD,

Plaintiff-Appellee,

v

LOUISIANA GREAT LAKES HOLDINGS, LLC; MCP CONSTRUCTION, LLC, doing business as QUADRANTS DEVELOPMENT, LLC; and I.S. NORTH, LLC,

Defendants-Appellants,

and

JOHN DOE LANDSCAPING AND IRRIGATION COMPANY,

Defendant.

UNPUBLISHED
November 19, 2020

No. 350311
Oakland Circuit Court
LC No. 2018-166539-NO

Before: BOONSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

PER CURIAM.

Defendants, Louisiana Great Lakes Holdings, LLC (LGLH), MCP Construction, LLC, doing business as Quadrants Development, LLC (MCP), and I.S. North, LLC (North), appeal by leave granted[1] the trial court's order denying their motion for summary disposition.[2] In this trip and fall premises liability action, defendants sought summary disposition on the basis of the open

[1] *Bird v Louisiana Great Lakes Holdings, LLC*, unpublished order of the Court of Appeals, entered November 27, 2019 (Docket No. 350311).

[2] It appears the John Doe Landscaping and Irrigation Company was never identified; therefore, it is not a party to this appeal. We will refer to LGLH, MCP, and North, collectively, as "defendants."

and obvious doctrine. We reverse and remand for entry of an order granting defendants' motion for summary disposition.

In June 2015, plaintiff, Sandra Bird, went to Papa Romano's with a colleague to pick up some carryout pizzas. The Papa Romano's was located in a strip mall owned by North. On her way back to her vehicle, plaintiff tripped over a sprinkler head that was located in a garden bed landscaped with red lava rocks at the intersection of two segments of sidewalk. As plaintiff attempted to take the sidewalk to the left, her foot caught on the elevated sprinkler head and she fell, sustaining multiple injuries. The sprinkler head was black and stuck out of the ground higher than the sidewalk. Witnesses testified that the sprinkler head should not have been as far out of the ground as it was. After depositions were taken, defendants moved for summary disposition on the basis of the open and obvious doctrine. Defendants primarily relied on photographs of the area by the sprinkler head that were taken shortly after plaintiff's fall. The trial court denied the motion, as well as defendants' motion for reconsideration. This appeal followed.

Defendants argue the sprinkler head was open and obvious because an average person of ordinary intelligence would have seen it upon casual inspection. We agree.

We review a trial court's ruling on a motion for summary disposition de novo. *Petersen Fin, LLC v Kentwood*, 326 Mich App 433, 441; 928 NW2d 245 (2018). "A motion under MCR 2.116(C)(10) . . . tests the factual sufficiency of a claim." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019) (emphasis omitted).[3] "When considering such a motion, a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id*. A motion under MCR 2.116(C)(10) should only be granted if "there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5; 890 NW2d 344 (2016). "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *El-Khalil*, 504 Mich at 160 (quotation marks and citation omitted).

"[A] premises possessor owes a duty to an invitee[4] to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Pugno v Blue Harvest Farms, LLC*, 326 Mich App 1, 12; 930 NW2d 393 (2018), quoting *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001) (quotation marks omitted). "A premises owner breaches its duty of care when it 'knows or should know of a dangerous condition on the premises of which the invitee is unaware and fails to fix the defect, guard against the defect,

[3] Although defendants moved for summary disposition under MCR 2.116(C)(8) in addition to MCR 2.116(C)(10), they relied on deposition testimony and photographs to support their motion and the trial court considered that evidence when it made its ruling. Therefore, we treat the motion as having been based on MCR 2.116(C)(10). See *Mitchell Corp of Owosso v Dep't of Consumer & Indus Servs*, 263 Mich App 270, 275; 687 NW2d 875 (2004).

[4] It appears uncontested that plaintiff was a business invitee of defendants. See also *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 604; 614 NW2d 88 (2000) (holding that invitee status is conferred upon a plaintiff when a defendant holds open its premises for a commercial purpose).

or warn the invitee of the defect.' " *Lowrey*, 500 Mich at 8, quoting *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012). "A possessor of land does not owe a duty to protect or warn an invitee of dangers that are open and obvious." *Wilson v BRK, Inc*, 328 Mich App 505, 513 n 3; 938 NW2d 761 (2019). "Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Id.*, quoting *Hoffner*, 492 Mich at 461 (quotation marks omitted).

Defendants argue that the sprinkler head that plaintiff tripped on was open and obvious. Plaintiff testified that she did not see the sprinkler head before she tripped on it, even though she was looking where she walked. Plaintiff's colleague who was with her when she fell, Danny Brenner, testified, "I do believe you had to look for it in order to see it. It was not something that jumped out." Derk Brown, the owner of a landscaping company and plaintiff's expert witness, asserted that the sprinkler was a tripping hazard because it was mounted too high and the landscaping material nearby obscured it. On the basis of this evidence, the trial court held there was a question of fact as to whether an average person of ordinary intelligence would have seen the sprinkler head upon casual inspection.

But the open and obvious test is objective; the court does not consider whether the particular plaintiff knew of the hazardous condition, but instead examines whether a reasonable person would have foreseen the danger. *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 713; 717 NW2d 719 (2007). Photographs of the area make clear there is no question of fact that the sprinkler head was open and obvious. The sprinkler head was black and surrounded by light-colored cement on two sides and dark red lava rocks on two sides. The sprinkler head stood up higher than the sidewalk and a white rock was leaning against it. Because the sprinkler head was black and stuck up higher than the light-colored cement immediately behind it, the sprinkler head stood out visually and was readily distinguishable from the sidewalk. Therefore, it is reasonable to expect that an average person of ordinary intelligence would have seen the sprinkler head upon casual inspection and avoided the danger it posed. See *Wilson*, 328 Mich App at 513 n 3. That plaintiff did not see the sprinkler head does not change the fact that the average person of ordinary intelligence would have—including because it *was* elevated. See *Kennedy*, 274 Mich App at 713. Further, a reasonably prudent person would have foreseen that a garden bed landscaped with lava rocks, which was not intended for walking, may have an elevated sprinkler head. Thus, a reasonably prudent person would look where she is going, observe the variations in the sidewalk and the lava rocks, and take appropriate care for her own safety. Reasonable minds would not differ on this issue. See *El-Khalil*, 504 Mich at 160. Because an average person with ordinary intelligence would have discovered the sprinkler head upon casual inspection, the open and obvious doctrine bars plaintiff's premises liability claim.[5] Accordingly, the trial court's order denying defendants' motion for summary disposition is reversed.

[5] Further, there is no question of fact that the sprinkler head did not have special aspects such that defendants should be held liable notwithstanding that it was an open and obvious condition. See *Lugo*, 464 Mich at 518 n 2; *Wilson*, 328 Mich App at 513. While this matter was raised by defendants but not addressed by the trial court, we consider this legal issue in the interest of judicial economy. See *Tingley v Kortz*, 262 Mich App 583, 588; 688 NW2d 291 (2004).

Reversed and remanded for entry of an order granting defendants' motion for summary disposition. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello