STATE OF MICHIGAN

COURT OF APPEALS

LINDA S. CONNOR,

Plaintiff-Appellant,

v

MEIJER, INC., MEIJER STORES LIMITED PARTNERSHIP, MEIJER'S SUPER MARKETS, INC., and MEIJER GROUP, INC.,

Defendants-Appellees.

UNPUBLISHED
December 17, 2020

No. 350314
Ingham Circuit Court
LC No. 18-000550-NO

Before: O'BRIEN, P.J., and M. J. KELLY and REDFORD, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition under MCR 2.116(C)(10). We affirm.

I. BACKGROUND

On August 29, 2015, plaintiff tripped on a pothole in the parking lot of a Meijer grocery store, causing her to fall and injure herself. Plaintiff did not see the pothole before she fell, but after falling, she saw the pothole and noticed exposed rebar steel lying flat in the pothole. During discovery, plaintiff testified that it was possible that she slipped on the exposed rebar. Defendants moved for summary disposition, arguing that the pothole and exposed rebar in the pothole were open and obvious. The trial court agreed and granted defendants' motion. This appeal ensued.

II. STANDARD OF REVIEW

Appellate courts review de novo a trial court's grant of summary disposition. *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 506; 885 NW2d 861 (2016). The trial court granted defendants summary disposition under MCR 2.116(C)(10). In *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999), our Supreme Court explained the review of a motion under MCR 2.116(C)(10) as follows:

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court

> considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Maiden*, 461 Mich at 120.]

A genuine issue of material fact exists when, after viewing the evidence in a light most favorable to the nonmoving party, reasonable minds could differ on the issue. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

III. OPEN AND OBVIOUS

Plaintiff first argues that there is a "question whether or not the subjects that caused [her] fall were actually 'open and obvious' as intended under Michigan law." We disagree.

Plaintiff was an invitee on defendants' property, and a premises possessor owes an invitee a duty of reasonable care "to protect the invitee from an unreasonable risk of harm caused by a dangerous condition in the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). But this duty is not absolute, and it does not extend to conditions that are open and obvious. *Id*. A condition is open and obvious, and a land possessor owes an invitee no duty to protect or warn of the condition, if "it is reasonable to expect that an average person with ordinary intelligence would have discovered [the condition] upon casual inspection." *Hoffner v Lanctoe*, 492 Mich 450, 461; 821 NW2d 88 (2012).

In *Lugo*, our Supreme Court held that, in general, a pothole is an open and obvious condition. *Lugo*, 464 Mich at 520-521. Plaintiff contends that the condition that caused her to fall was not the pothole, but was the exposed rebar in the pothole. Yet evidence submitted to the trial court clearly established that an average person with ordinary intelligence would have discovered both the pothole and the exposed rebar in the pothole upon casual inspection. Thus, the trial court properly concluded that the condition that caused plaintiff to fall—whether the pothole or the exposed rebar in the pothole—was open and obvious.[1]

Plaintiff contends that the condition that caused her to fall was not open and obvious because she did not see it until after she fell. Our Supreme Court addressed the same argument in *Lugo* and held that a condition is open and obvious even if a plaintiff "fail[s] to notice it." *Id*. at 522. Thus, plaintiff's failure

[1] Plaintiff contends that this Court should conclude that the exposed rebar in the pothole was not open and obvious based on *Eason v Coggins Mem Christian Methodist Episcopal Church*, 210 Mich App 261; 532 NW2d 882 (1995). In *Eason*, the plaintiff agreed to make repairs to buildings owned by the defendant, and then fell while using a ladder set up by the defendant's agents. *Id*. at 262. The plaintiff argued that the defendant was liable under a premises-liability theory because the ladder defendant's agents set up on its premises was missing a safety latch. *Id*. at 262-263. The trial court disagreed, holding that the missing safety latch was an open and obvious condition. *Id*. at 262-263. This Court reversed, reasoning that the missing safety latch was not obvious and that the plaintiff sought to prove that the missing safety latch was "a latent defect in the ladder that [the] defendant failed to identify and warn [the plaintiff] about." *Id*. at 265-266. Clearly, the instant case significantly differs from *Eason*. Plaintiff fails to explain how exposed rebar in a pothole is analogous to a missing safety latch in a ladder, and we do not believe *Eason* should control [or controls] the outcome of this case.

to notice the pothole and the exposed rebar in the pothole does not preclude application of the open and obvious doctrine to this case.

IV. SPECIAL ASPECTS

Plaintiff argues that even if the condition that caused her to fall was open and obvious, defendants still had a duty to warn plaintiff of the condition because it was unreasonably dangerous. We disagree.

When a condition is open and obvious, a land possessor may nonetheless owe an invitee a duty to protect or warn of a condition if the condition has special aspects that give rise to an unreasonable risk of harm. *Lugo*, 464 Mich at 517. There are "two instances in which the special aspects of an open and obvious hazard could give rise to liability: when the danger is *unreasonably dangerous* or when the danger is *effectively unavoidable*." *Hoffner*, 492 Mich at 463.

Plaintiff contends that the location of the pothole with the exposed rebar—"in a busy thoroughfare with cars driving about"—made the condition unreasonably dangerous. Plaintiff explains, "The presence of the exposed rebar and hole in the midst of where traffic is present created an unreasonable risk sufficiently justifying why the Plaintiff-Appellant would not have seen the rebar and hole (despite the possibility that such rebar and hole could perhaps be considered 'open and obvious' if in a different location)." Our Supreme Court rejected this argument in *Lugo*, stating, "While plaintiff argues that moving vehicles in the parking lot were a distraction, there is certainly nothing 'unusual' about vehicles being driven in a parking lot, and, accordingly, this is not a factor that removes this case from the open and obvious danger doctrine." *Lugo*, 464 Mich at 522. Plaintiff acknowledges *Lugo*, but ignores this portion of the *Lugo* opinion and, as such, fails to explain why *Lugo* does not control the outcome of this argument. Because we find *Lugo* directly on point, we conclude that, as in *Lugo*, the distraction posed by moving vehicles near the pothole did not make the pothole or the exposed rebar in the pothole unreasonably dangerous.[2]

Affirmed.

/s/ Colleen A. O'Brien
/s/ Michael J. Kelly
/s/ James Robert Redford

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[2] Plaintiff urges us to adopt a "distraction exception" to the open and obvious doctrine in Michigan. It appears that this Court has already recognized such an exception in *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 717; 737 NW2d 179 (2007), wherein this Court explained that an "unusual" distraction could "preclude application of the open and obvious danger doctrine." This exception is clearly inapplicable to this case, however, because "there is certainly nothing 'unusual' about vehicles being driven in a parking lot[.]" *Lugo*, 464 Mich at 522.

Plaintiff also requests additional discovery, but plaintiff's request is unavailing because she has not proffered evidence establishing the existence of a disputed issue. See *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994).