STATE OF MICHIGAN

COURT OF APPEALS

LINDA BIERBUSSE,

Plaintiff-Appellant,

v

DOLLAR TREE STORES, INC.,

Defendant,

and

SECOR-STERNS INVESTMENT, LLC,

Defendant-Appellee.

UNPUBLISHED
January 21, 2021

No. 351359
Monroe Circuit Court
LC No. 18-141445-NO

Before: JANSEN, P.J., and SERVITTO and RIORDAN, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right the trial court's order granting summary disposition to defendant Secor-Sterns Investment, LLC ("Secor"). We affirm.

I. FACTS & PROCEDURAL HISTORY

This case arises out of a slip and fall incident in the parking lot of a shopping center plaza. Secor owns and operates the plaza and defendant Dollar Tree Stores, Inc. ("Dollar Tree") is a tenant. Plaintiff slipped and fell while traversing the parking lot on her way from the Dollar Tree store to her friend's vehicle.

According to plaintiff, water puddles of varying sizes covered the parking lot's surface. On her way to the Dollar Tree store, plaintiff noticed one puddle that was 3 or 4 feet long. Plaintiff testified that the puddle looked different than the rest of the area surrounding it because there was a contrast between the big puddle and the rest of the asphalt. On her way out of the store, plaintiff was not looking at the ground as she was walking and she stepped in a pothole that was covered with water. She fell and broke her arm.

Plaintiff filed suit against Dollar Tree and Secor, alleging a claim of premises liability. Upon the stipulation of plaintiff and Secor, the trial court ordered all claims against Dollar Tree to be dismissed. After discovery, Secor moved for summary disposition pursuant to MCR 2.116(C)(10) and argued that the pothole was an open and obvious condition. The trial court concluded that both the pothole and the water were open and obvious, and the fact that the pothole was filled with water did not remove the pothole from being an open and obvious condition. Moreover, the trial court determined that the "water filled pothole" was not "unavoidable," and it did not present an "unreasonable high risk of harm." Accordingly, the trial court granted Secor's motion for summary disposition and dismissed plaintiff's complaint with prejudice. Plaintiff now appeals.

II. ANALYSIS

Plaintiff argues that the pothole was not open and obvious because it was covered with water. We disagree.

We review de novo a trial court's decision on a motion for summary disposition. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Id*. at 160. "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) is properly granted when there is no genuine issue of material fact. *Id*. "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *Id*., quoting *Johnson v VanderKooi*, 502 Mich 751, 761; 918 NW2d 785 (2018). "Whether a defendant owes a particular plaintiff a duty is a question of law that this Court reviews de novo," *Bailey v Schaaf*, 494 Mich 595, 603, 835 NW2d 413 (2013), and is "an issue solely for the court to decide," *Murdock v Higgins*, 454 Mich 46, 53, 559 NW2d 639 (1997) (quotation marks and citation omitted).

"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). It is undisputed that plaintiff was an invitee on Secor's premises and "a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee 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, this duty "does not generally encompass removal of open and obvious dangers." *Id*. When the dangers are "so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee." *Id*. "Accordingly, the open and obvious doctrine should not be viewed as some type of 'exception' to the duty generally owed invitees, but rather as an integral part of the definition of that duty." *Id*. This is because "both the possessors of land and those who come onto it [must] exercise common sense and prudent judgment when confronting hazards on the land." *Hoffner v Lanctoe*, 492 Mich 450, 459; 821 NW2d 88 (2012).

"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*. at 461. This standard is not a subjective one, and courts must consider the "objective nature of the condition of the premises at issue." *Lugo*, 464 Mich at 524. Specifically, "potholes in

pavement are an 'everyday occurrence' that ordinarily should be observed by a reasonably prudent person." *Id.* at 523, quoting *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995).

Plaintiff testified there were puddles of water of varying sizes all over the parking lot, one of which was 3- or 4-feet long, and that there was nothing obscuring her view from seeing the pothole and the water inside it. Plaintiff also testified that the puddles of water looked different than the rest of the parking lot and that she could discern where the puddles were located in the parking lot. The existence of the puddle, caused by the unevenness of the surface or a depression in the ground, alerts a person of a dangerous defect in the ground that may cause a person to fall. Because a reasonable person would have been alerted to the danger of uneven ground by the existence of puddles of standing water throughout the parking lot, and nothing obscured plaintiff's view, the hazard plaintiff encountered was open and obvious.

Furthermore, plaintiff testified that on her way out of the store, she was not looking at the ground as she was walking before she stepped in the pothole. After she fell, she was able to identify the defect once she inspected the surface of the ground over which she was walking. Consequently, there is no genuine issue of material fact that plaintiff "would have noticed the potentially hazardous condition had she been paying attention." *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 714; 737 NW2d 179 (2007). It is of no consequence that she did not first observe the hazard before she fell because the test is an objective one. *Lugo*, 464 Mich at 524. Nor does this case present any special aspects which make the pothole unreasonably dangerous and render it an exception to the open and obvious doctrine. *Lugo*, 464 Mich at 517 (special aspects are unusual in "character, location, or surrounding circumstances" such as an unguarded 30-foot deep pit in a parking lot). Because the danger was open and obvious, Secor had no duty to warn or protect plaintiff from the danger presented by the defect on the surface of its parking lot.

III. CONCLUSION

There is no genuine issue of material fact regarding the open and obvious nature of the pothole, and therefore, the trial court properly granted summary disposition to Secor. Accordingly, we affirm.

/s/ Kathleen Jansen
/s/ Deborah A. Servitto
/s/ Michael J. Riordan