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# STATE OF MICHIGAN

# COURT OF APPEALS

CHRISTY MOORE,

Plaintiff-Appellant,

v

STIMAC COMMERCIAL PROPERTIES, LLC,

Defendant,

and

S&J INVESTMENT, LLC,

Defendant-Appellee.

UNPUBLISHED
October 27, 2022

No. 357778
Van Buren Circuit Court
LC No. 20-070420-NO

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

PER CURIAM.

Plaintiff, Christy Moore, fell and broke her leg while walking out of a Marathon gas station and convenience store owned and operated by defendants. Moore explained in her deposition that she was familiar with the sidewalk at the store because she had been there several times, but in the early evening on March 27, 2018, she tripped and fell off the edge of the elevated sidewalk because her right foot slid into a crack in the sidewalk that caught her boot and caused her to fall. Ruling on the plaintiff's premises-liability claim, the trial court granted summary disposition to defendant, S&J Investment, LLC (S&J), under MCR 2.116(C)(10). On appeal, we conclude that the evidence, when viewed in the light most favorable to plaintiff, created no genuine issue of material fact that must be resolved at trial. Thus, we shall affirm the trial court's award of summary disposition.

## I. FACTUAL BACKGROUND

Just after 5:00 p.m. on March 27, 2018, plaintiff went into the Marathon gas station in Paw Paw to pay for gas and pick up snacks. Plaintiff had visited that gas station about ten times before, so she was familiar with the premises, including the slightly raised sidewalk in front of the station. The sidewalk was wet because it had been raining earlier that day, but there was no snow or ice on the sidewalk. It was not yet dark outside, so visibility was not an issue for plaintiff. Plaintiff had

no trouble stepping up to walk across the sidewalk into the gas station. The surface of the sidewalk had standard expansion-joint cracks, which are readily visible in this picture that plaintiff took:

Plaintiff testified at her deposition that, at the time of her fall, she was wearing flat, suede boots with rubber soles, but no heels. As she walked out of the gas station, plaintiff "went to step down" but her right "foot slid into the crack and caught [her] boot and then [she] hit the ground." When she mentioned "the crack," plaintiff was referring to the crack just below the expansion joint on the left side of the picture. Everyone agrees that, as a result of her fall from the raised sidewalk, plaintiff broke her left leg in three places.

On September 14, 2020, plaintiff filed this action asserting a premises-liability claim in her complaint. After discovery, defendants moved for summary disposition under MCR 2.116(C)(10). The trial court awarded that relief,[1] and plaintiff thereafter appealed.

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[1] By agreement of the parties, the trial court dismissed defendant Stimac Commercial Properties, LLC (Stimac) from the case because the parties agreed that S&J had possession and control of the premises. By stipulation and order, claims on appeal against Stimac were also dismissed. *Moore v Stimac Commercial Props LLC*, unpublished order of the Court of Appeals, entered August 31, 2021 (Docket No. 357778). As a result, only S&J remains as a defendant.

## II. LEGAL ANALYSIS

Plaintiff contends that the trial court erred by awarding summary disposition to defendant S&J under MCR 2.116(C)(10), which enabled S&J to test the factual sufficiency of the premises-liability claim. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160, 904 NW2d 601 (2019). In ruling on the motion, the trial court had to consider all evidence submitted by the parties in the light most favorable to the party opposing the motion, *id.*, and the motion could only be granted if there was 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.* We review de novo the trial court's decision to award summary disposition to defendant S&J. *Id.* at 159.

To prevail in this premises-liability case, 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). A claim for premises liability "arises solely from the defendant's duty as an owner, possessor, or occupier of land." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 692; 822 NW2d 254 (2012). The duty owed by a property possessor to a visitor on the property is dictated by the visitor's status as an invitee, licensee, or trespasser. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). "A person invited on the land for the owner's commercial purposes or pecuniary gain is an invitee," *Benton*, 270 Mich App at 440, so we recognize plaintiff in this case as an invitee.

"[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). Thus, as a threshold matter, we must consider whether there was a dangerous condition on the land where plaintiff fell. *Id.* When analyzing whether a dangerous condition existed, "[p]erfection is neither practicable nor required by the law," so courts cannot impose "a duty on the possessor of land to make ordinary conditions foolproof." *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012). "As a general rule, a drop-off, like a step, does not in and of itself create a risk of harm because if a drop-off is seen, a reasonable person can readily navigate it without incident." *Blackwell v Franchi*, 318 Mich App 573, 575-576; 899 NW2d 415 (2017). Only "where there is something unusual about the steps, because of their character, location, or surrounding circumstances, [does] the duty of the possessor of land to exercise reasonable care remain[ ]." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617; 537 NW2d 185 (1995) (quotation marks omitted). In this case, plaintiff contends that the crack at the expansion joint in the sidewalk was "something unusual about the step" because of its character. *Id.* But "[p]erfection is neither practicable nor required by the law," *Hoffner*, 492 Mich at 460, so the crack in the sidewalk at the expansion joint cannot be characterized as something unusual that rises to the level of a "dangerous condition on the land." See *Lugo*, 464 Mich at 516.

Following the parties' lead, the trial court resolved the case by analyzing whether the crack in the sidewalk was "open and obvious." Under the open-and-obvious doctrine, "if the particular activity or condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger." *Bertrand*, 449 Mich at 611. Accordingly, "the question is whether plaintiff *should have* discovered" the crack in the sidewalk "and realized its danger." *Blackwell*, 318 Mich App at 576. Whether plaintiff should have discovered the crack

"turns on whether 'an average user with ordinary intelligence acting under the same conditions would have been able to discover the danger and the risk presented by the condition upon casual inspection.' " *Id.* "If so, the condition is open and obvious, and no duty to warn arises." *Id.*

As the trial court accurately noted, the crack and deterioration in the sidewalk were readily visible from above in the picture taken by plaintiff and offered as evidence of her premises-liability claim. Moreover, the presence of the expansion joint at that very same place put "an average user" on notice that there was a seam in the sidewalk at that location. Consequently, the trial court made the correct determination that " 'an average user with ordinary intelligence acting under the same conditions would have been able to discover the danger and the risk presented by the condition upon casual inspection.' " *Id.* In her appellant's brief, plaintiff asserts that the crack, rather than the readily visible expansion joint, caused her fall because, "[a]s she attempted to step down from the sidewalk and proceed toward the car, the heel of [her] boot got caught in [the] crack at the end of the sidewalk[.]" But plaintiff testified at her deposition that, at the time of her fall, she was wearing boots *without* heels because "I can't wear heels." Accordingly, plaintiff's entire argument on appeal rests upon a false premise,[2] so we have no basis to disturb the trial court's ruling that the crack in the sidewalk was open and obvious under Michigan law.

An open and obvious defect does not insulate a property possessor from liability "if special aspects of [the defect] make even an open and obvious risk unreasonably dangerous[.]" *Lugo*, 464 Mich at 517. Therefore, in addressing plaintiff's claim, "the critical question is whether . . . there are truly 'special aspects' of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm." *Id.* Our Supreme Court has expressly ruled that 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. A single step with a crack and deterioration cannot possibly be characterized as unreasonably dangerous, as we explained in addressing a case involving three steps. *Corey v Davenport College of Business*, 251 Mich App 1, 6-7; 649 NW2d 392 (2002). Likewise, the crack and deterioration here were not effectively unavoidable because plaintiff could have stepped off the sidewalk at any point other than the spot where the crack and deterioration had occurred at the expansion joint. See *Finazzo v Fire Equip Co*, 323 Mich App 620, 633-634; 918 NW2d 200 (2018). As a result, plaintiff cannot overcome the open-and-obvious doctrine's bar to her claim by relying upon special aspects.

Affirmed.

/s/ Michael F. Gadola
/s/ Christopher P. Yates

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[2] The affidavit of plaintiff's expert, Steven Ziemba, asserts that "[t]he fragment of pavement that had broken away created a hole (hazardous condition) that could not be readily seen upon casual observation as it blended in the surrounding pavement." This assertion presupposes that plaintiff caught her heel in the hole, which was a "hazardous condition." But because plaintiff's boots had no heels, that theory is utterly implausible.