STATE OF MICHIGAN

COURT OF APPEALS

MARK SCHIMANSKI,

Plaintiff-Appellant,

v

SQUAD THREE VENTURES, L.L.C., d/b/a THE ENGINE HOUSE,

Defendant-Appellee,

and

PIZZO CEMENT CORPORATION, DEWULF ASSOCIATES, L.L.C., and FENN & ASSOCIATES SURVEYING, INC., d/b/a FENN & ASSOCIATES, INC.,

Defendants.

UNPUBLISHED
March 20, 2012

No. 301694
Macomb Circuit Court
LC No. 2009-001772-NI

Before: STEPHENS, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition in this premises liability and public nuisance action. We affirm.

Plaintiff tripped and fell on defendant's business premises. Apparently, while plaintiff was walking from the parking lot, he tripped on a raised concrete edge and, unable to regain his balance, fell into a metal fence some feet away sustaining injuries. Subsequently, plaintiff filed this premises liability and nuisance action. Eventually, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing in the alternative that plaintiff could not produce sufficient evidence that a dangerous condition caused his fall, that any such condition was open and obvious, and that any such condition did not threaten the general public. Plaintiff opposed the motion, but the trial court agreed with defendant and defendant's motion was granted. The court concluded that the purportedly dangerous condition—an "angled/sloped curb," was open and obvious, as "curbs between parking lots and sidewalks are a common rather than unique condition." And "the curb lacked any special aspects that would preclude application of the open and obvious danger doctrine." Further, the curb was not a public

nuisance in that it was "not a dangerous, offensive or hazardous condition that unreasonably interferes with the use of the premises." This appeal followed.

Plaintiff argues that the trial court erroneously dismissed his premises liability action because the condition that caused him to trip was not open and obvious. We disagree.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Motions brought under MCR 2.116(C)(10) are reviewed by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party to determine whether a genuine issue as to any material fact exists. *Id*.

Here, it is uncontested that plaintiff was an invitee on defendant's business premises. Thus, defendant owed plaintiff a duty to exercise reasonable care to protect him from an unreasonable risk of harm caused by a dangerous condition on the land. *Benton v Dart Props, Inc*, 270 Mich App 437, 440-441; 715 NW2d 335 (2006). However, absent special aspects, defendant was not required to protect plaintiff from open and obvious dangers. *Id*. A danger is open and obvious if an average person with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). Plaintiff argues that the elevation that he tripped on was not open and obvious "because there was not contrast between it and the concrete that would give it height, depth, or conspicuity." However, after review of the evidence, we agree with the trial court's reasoning and conclude that the elevated area of concrete that allegedly caused plaintiff to trip was discoverable upon casual inspection by an average person. And there were no special aspects about the condition that precludes application of the open and obvious doctrine. Accordingly, plaintiff's premises liability claim was properly dismissed.

Next, plaintiff argues that the trial court failed to use the proper criteria to determine whether a public nuisance existed. We disagree.

Plaintiff alleged that the disputed condition was an intentional public nuisance in fact. "A public nuisance is an unreasonable interference with a common right enjoyed by the general public." *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995). An "unreasonable interference" includes conduct that significantly interferes with the public's health and safety. *Id*. To bring an action for public nuisance, a person must show that he suffered a type of harm different from that of the general public. *Id*. And a nuisance in fact is

> a nuisance by reason of circumstances and surroundings. An act may be found to be a nuisance in fact when its natural tendency is to create danger and inflict injury on person or property. A negligent nuisance in fact is one that is created by the landowner's negligent acts, that is, a violation of some duty owed to the plaintiff which results in a nuisance. A nuisance in fact is intentional if the creator intends to bring about the conditions which are in fact found to be a nuisance. To establish intent, the plaintiff must show that when the defendant created or continued the condition causing the nuisance, he knew or must have known that the injury was substantially certain to follow, in other words,

deliberate conduct. [*Wagner v Regency Inn Corp*, 186 Mich App 158, 164; 463 NW2d 450 (1990) (citations omitted).]

Plaintiff argues that the trial court incorrectly applied the elements of negligence, rather than nuisance. In its opinion and order, the trial court stated the standard for a public nuisance. The trial court then concluded that defendant's premises were held open to the general public and that "the curb was readily apparent upon casual observation," "could easily have been avoided," and "did not impose a high likelihood or severity of harm." Although this appears to be a negligence analysis, the court also concluded that (1) plaintiff failed to present any evidence to suggest that the curb had "a natural tendency to create danger and inflict injury to people," and (2) "the curb is not a dangerous, offensive or hazardous condition that unreasonably interferes with the use of the premises." Thus, the trial court properly considered plaintiff's nuisance claim. See *Cloverleaf Car Co*, 213 Mich App at 190; *Wagner*, 186 Mich App at 164. Further, plaintiff failed to establish that he suffered a type of harm different from the type of harm that a member of the general public could have suffered. See *McCue v O-N Minerals (Mich) Co*, 490 Mich 946; 805 NW2d 837 (2011); *Cloverleaf Car Co*, 213 Mich App at 190. Accordingly, plaintiff's nuisance claim was also properly dismissed.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Mark J. Cavanagh
/s/ Henry William Saad