STATE OF MICHIGAN

COURT OF APPEALS

ANNE CLOGG, Plaintiff-Appellant,	UNPUBLISHED February 16, 2012
v	No. 303197 Macomb Circuit Court
JNL VENTURES, INC., d/b/a SHIELD'S OF WARREN, Defendant-Appellee.	LC No. 2009-004657-NO

Before: SERVITTO, P.J., and TALBOT and K.F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to defendant in this premises liability action. We affirm.

I. BASIC FACTS

This action arises out of injuries sustained by plaintiff when she tripped and fell on the sidewalk on defendant's premises. Plaintiff, her husband, and her daughter were walking into defendant's restaurant on November 24, 2007. The ground was covered with leaves at the time, and the sidewalk underneath was not visible. There is an approximately two-inch lip in the sidewalk in the area where plaintiff tripped, just in front of the stairs leading up to the restaurant's entrance. No one was exactly sure what plaintiff tripped on at the exact moment it happened. However, upon inspection, plaintiff's husband and daughter saw the lip and assumed it was what caused plaintiff to trip. Plaintiff testified at her deposition that she did not know what tripped her, just that her foot "bumped into something," that she "hit something," "stubbed something," and that she "now know[s] there was a lip there." Plaintiff had been to the restaurant at least three times previously and had never fallen before.

Defendant filed a motion for summary disposition under MCR 2.166(C)(8) and (10). Defendant claimed that the condition was open and obvious and that it had no duty to repair or warn against. Defendant maintained that the condition did not possess any special aspects that made it unavoidable or highly likely to cause severe harm. Defendant also claimed plaintiff's deposition testimony regarding the cause of her fall was pure speculation.

In response, plaintiff asserted that the sidewalk lip hidden under the leaves was not open and obvious upon casual inspection and, therefore, defendant owed a duty to plaintiff to either warn her of the risk or make repairs.

The trial court issued a written opinion and order, granting defendant summary disposition. The court found the sidewalk lip covered by leaves was an open and obvious condition and, on that basis alone, summary disposition was appropriate. Nevertheless, the trial court went on to find plaintiff's causation evidence was, as defendant averred, purely speculative. The trial court denied plaintiff's motion for reconsideration. She now appeals as of right.

II. STANDARD OF REVIEW

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and 2.116(C)(10). Although the trial court did not explicitly state the rule under which it was granting summary disposition, the trial court considered the exhibits attached to both motions, thus, the order was entered pursuant to MCR 2.116(C)(10).[1] A trial court's judgment on a motion for summary disposition is reviewed de novo. *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). A motion based on MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Summary disposition is proper if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." *Maiden*, 461 Mich at 120; MCR 2.116(C)(10). We must review the evidence in the light most favorable to the nonmoving party in determining whether a genuine issue of material fact exists. *Maiden*, 461 Mich at 120. A genuine issue of material fact exists when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2000).

III. ANALYSIS

Plaintiff argues that the condition was not open and obvious because the defect – a lip in the sidewalk leading up the stairs to defendant's premises – was completely covered in leaves. We disagree.

To prove a claim for negligence, a plaintiff must show: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) that the breach was the proximate cause of plaintiff's harm, and (4) damages. *Loweke v Ann Arbor Ceiling & Partition Co*, ___ Mich ___; ___ NW2d ___ (Docket No 141168, issued June 6, 2011) (slip op at 2). The duty a landowner owes to a person on its property varies depending on the person's classification as a trespasser, a licensee, or an invitee. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). "An 'invitee' is a person who enters upon the land of another upon an invitation which

[1] See *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007) (when a trial court considers facts outside the pleadings, summary disposition is treated as having been based on MCR 2.116(C)(10)).

carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make them safe for their reception." *Wymer v Holmes*, 429 Mich 66, 71 n 1; 412 NW2d 213 (1987), overruled on other grounds 470 Mich 661 (2004)). To be an invitee, a person must be present on the landowner's premises for commercial purposes. *Stitt*, 462 Mich at 604. Here, plaintiff was on defendant's premises as a customer visiting a restaurant. This is clearly a commercial purpose, justifying plaintiff's classification 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*, 464 Mich 512, 516; 629 NW2d 384 (2001). A landowner must not only warn an invitee of dangers known to the landowner, but also maintain the premises, including inspecting the premises and, if necessary, making repairs or warning of hazards the landowner discovers. *James v Alberts*, 464 Mich 12, 19-20; 626 NW2d 158 (2001). "Thus, an invitee is entitled to the highest level of protection under premises liability law." *Id.* at 20. However, this duty does not extend to conditions that are known to the invitee, or which are open and obvious such that the invitee can reasonably be expected to discover them. *Lugo*, 464 Mich at 516. A condition is only open and obvious if it is "'readily apparent or easily discoverable upon casual inspection by the average user of ordinary intelligence.'" *Novotney v Burger King Corp*, 198 Mich App 470, 473; 499 NW2d 379 (1993). Still, where special aspects of a condition make even an open and obvious risk unreasonably dangerous, the possessor must take reasonable steps to protect invitees from harm. *Lugo*, 464 Mich at 517. Special aspects are those that "give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided." *Id*. at 519. Neither a common condition nor an avoidable condition is uniquely dangerous. See *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 8–9; 649 NW2d 392 (2002).

We conclude that a leaf-concealed sidewalk lip was an open and obvious danger and the trial court correctly granted defendant summary disposition. Plaintiff's fall occurred during autumn in Michigan when leaf-covered sidewalks are neither remarkable nor unexpected. Casual observation would alert the average individual of the potential danger posed from slipping on the leaves or tripping over something hidden under the leaves.[2]

Given our conclusion that summary disposition was properly granted under the "open and obvious" doctrine, we decline to address plaintiff's remaining issue on appeal wherein she argues that the trial court erred in concluding that the cause of her injury was mere speculation.

[2] We also note that this Court reached the same conclusion on similar facts in *Haden v Walden Pond Condo Assn*, unpublished opinion per curiam of the Court of Appeals, issued December 21, 2004 (Docket No 249476), and *Williams v Holiday Ventures Apts, Inc*, unpublished opinion per curiam of the Court of Appeals, issued March 1, 2011 (Docket No 296051). Although unpublished opinions of this Court are not binding precedent, they may be considered instructive or persuasive. MCR 7.215(C)(1); *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010).

Affirmed.

/s/ Deborah A. Servitto
/s/ Michael J. Talbot
/s/ Kirsten Frank Kelly