

STATE OF MICHIGAN
COURT OF APPEALS

RAY MEOLA and BEVERLY MEOLA,
Plaintiffs-Appellants,

UNPUBLISHED
December 17, 2013

v

CHESTERFIELD DEVELOPMENT COMPANY,
L.L.C.,

No. 312353
Macomb Circuit Court
LC No. 2011-004608-NO

Defendant-Appellee.

Before: WILDER, P.J., and FORT HOOD and SERVITTO, JJ.

PER CURIAM.

Plaintiffs¹ appeal as of right an order granting summary disposition to defendant in this premises liability action. Because the condition causing plaintiff's fall was open and obvious and no special aspects applied, we affirm.

This case arises out of plaintiff's slip and fall on a broken curb leading from the walkway in front of a retail store in a strip mall into the parking lot on defendant's premises. After arriving at the strip mall and parking their vehicle, plaintiff walked across the parking lot, up the curb, down the sidewalk, and entered the retail store with no difficulty. Returning from the store to his vehicle, however, plaintiff stepped on a broken section of the curb, and fell to the ground. Inside this broken section of the curb was a length of exposed rebar, which plaintiff claims was very slippery, ultimately causing his fall. Plaintiff injured his wrist and ribs in the fall. The trial court granted summary disposition in favor of defendant, finding that the broken concrete was open and obvious, and it lacked any special aspects that would remove it from the open and obvious doctrine.

On appeal, plaintiffs argue that the trial court erred by granting defendant's motion for summary disposition and dismissing their premises liability claim because there was a question of fact whether the defect was open and obvious. We disagree.

¹ Because the claims of plaintiff, Beverly Meola, are derivative, we use "plaintiff" to refer to plaintiff, Ray Meola, individually.

“This Court reviews de novo a trial court’s decision on a motion for summary disposition.” *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass’n*, 491 Mich 200, 206; 815 NW2d 412 (2012). In reviewing the grant of summary disposition under MCR 2.116(C)(10), this Court considers the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Sallie v Fifth Third Bank*, 297 Mich App 115, 117-118; 824 NW2d 238 (2012). This Court is “limited to considering the evidence submitted to the trial court before its decision on the motions.” *Calhoun Co v Blue Cross Blue Shield of Mich*, 297 Mich App 1, 12; 824 NW2d 202 (2012). Summary disposition is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). “This Court is liberal in finding genuine issues of material fact.” *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008). A genuine issue of material fact exists when, after viewing the evidence in the light most favorable to the nonmoving party, the record leaves open an issue upon which reasonable minds may differ. *Debano-Griffin v Lake County*, 493 Mich 167, 175; 828 NW2d 634 (2013).

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiffs failed to raise a genuine issue of material fact whether the condition causing plaintiff’s injuries was open and obvious. “The duty that a possessor of land owes to another person who is on the land depends on the latter person’s status. The status of a person on land that the person does not possess will be one of the following: (1) a trespasser, (2) a licensee, or (3) an invitee.” *O’Donnell v Garasic*, 259 Mich App 569, 573; 676 NW2d 213 (2003). Neither party disputes that plaintiffs were invitees when they entered defendant’s property.

A landowner’s duties to an invitee includes not only the duty to warn of any known dangers, but also to make the premises safe, which requires that the landowner inspect the premises and make any necessary repairs. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000). A landowner is subject to liability for physical harm caused to invitees by a condition on the land if the owner: (1) knows of, or through reasonable care should discover, the condition and should realize that the condition involves an unreasonable risk of harm to the invitees; (2) should expect that invitees will not discover or realize the danger, or will fail to protect against it; and (3) fails to exercise reasonable care to protect invitees from the danger. *Id.* Therefore, an invitee is given the highest level of protection within premises liability law. *Id.*

While the above is true, “a premises owner is not an insurer of the safety of invitees.” *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 94; 485 NW2d 676 (1992). In situations in which an invitee knows of a danger, or where the danger is so obvious that a reasonable invitee should discover it, a premises owner owes no duty to protect the invitee unless harm should be reasonably anticipated despite the invitee’s awareness of the danger. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001), quoting *Riddle*, 440 Mich at 96. Whether a condition is open and obvious is an objective standard that depends on whether 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).

Yet, “if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk.” *Lugo*, 464 Mich at 517. A “special aspect” that would remove a condition from the open and obvious doctrine is one that gives rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided. *Id.* at 518-519. “[T]ypical open and obvious dangers (such as ordinary potholes in a parking lot) do not give rise to these special aspects.” *Id.* at 520.

In the present case, there is no genuine issue of material fact that the condition that caused plaintiff’s fall was open and obvious. Plaintiff originally did not see what his foot made contact with that caused him to slip, but after he fell he was able to see the condition. Plaintiff testified that, after the fall, he noticed the broken section of the curb and the exposed rebar inside. Plaintiff further testified that it was a clear, sunny day, and there was no ice or snow on the ground. Additionally, plaintiff was able to see the sidewalk and curb in general, as the curb had been painted bright yellow. Photographic evidence showed that, even from the perspective of an individual exiting the retail store and walking toward the parking lot, the fact that a portion of the curb was missing was clearly evident. A condition is open and obvious if “it is reasonable to expect that an *average person* with ordinary intelligence would have discovered the condition upon a *casual inspection*.” *Hoffner*, 492 Mich at 461 (emphasis added). If plaintiff would have casually inspected the curb by simply looking down before taking a step, the entire defect, i.e., both the broken concrete and the exposed rebar within, would have been obvious to him, even from a few feet away.

Plaintiffs also argue that it was not the broken concrete that caused plaintiff’s fall, but the piece of exposed rebar. Plaintiffs argue that the broken concrete and exposed rebar are “two separate and distinct defects,” and the one defect hid the second from view. Plaintiffs contend that this “defect within a defect” theory makes whether the exposed rebar was open and obvious a genuine issue of material fact. In support of plaintiffs’ “defect within a defect” argument, they rely upon an unpublished opinion of this Court. Unpublished opinions carry no precedential weight, MCR 7.215(C)(1), and we do not find plaintiffs’ argument persuasive.

Regardless, the case at hand is analogous to *Lugo*, wherein the plaintiff was walking through the defendant’s parking lot to pay a telephone bill when she stepped in a pothole and fell. *Lugo*, 464 Mich at 515. The Court found that a pothole is a “typical open and obvious danger[,],” and therefore, did not have any special aspects that would take the defect out of the open and obvious doctrine. *Id.* at 520. Potholes can be easily avoided by an ordinarily prudent person, and the fact that the plaintiff was not looking down because she was distracted by the moving vehicles in the parking lot did not qualify as an “unusual” or “special aspect.” *Id.* at 520, 522. In the case at hand, plaintiff could easily have avoided the broken concrete, as he did on his way into the store. Also, defendant provided an access ramp only mere feet away from where plaintiff fell for people, like him, who had ambulatory difficulties. Plaintiff testified that he noticed the angled ramp after his fall and had no explanation as to why he did not notice it or use it beforehand. Thus, the broken concrete was an easily avoidable condition.

Further, *Lugo* is analogous to the case at hand as to the severity of possible harm. In *Lugo*, the Court found that a “typical person” tripping over a pothole could not reasonably be expected to suffer severe injury, such as one would suffer from falling an extended distance. *Id.*

at 520. Similarly, falling off of a curb constitutes a drop of at most roughly 6 to 12 inches. While plaintiff did suffer a broken rib in the fall, he was roughly 85 years old at the time, and had been in declining health for some time. A “typical person” would not be expected to suffer such injuries from falling off of a curb. Like a pothole, a broken curb is the type of “typical open and obvious danger[]” that does not carry with it any “special aspects” of risk of harm. See *Id.* at 520, 522. Thus, the broken concrete also did not have a risk of severe harm.

Because the broken section of concrete was an open and obvious condition and did not have any “special aspects” that took it out of the open and obvious doctrine, summary disposition was properly granted in favor of defendant.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto