STATE OF MICHIGAN

COURT OF APPEALS

ELIZABETH MARRIOTT,

Plaintiff-Appellant,

v

BEAUMONT PROPERTIES, INC.,

Defendant-Appellee.

UNPUBLISHED
July 8, 1997

No. 190388
Oakland Circuit Court
LC No. 95-491842

Before: Reilly, P.J., and Wahls and N.O. Holowka*, JJ.

PER CURIAM.

Plaintiff appeals as of right a circuit court order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff first argues that the trial court erred in failing to find that a question of fact existed as to whether the alleged dangerous condition on defendant's premises was open and obvious. We disagree. A trial court's determination of a motion for summary disposition is reviewed de novo on appeal. *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). MCR 2.116(C)(10) permits summary disposition when, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.* A court reviewing such a motion, therefore, must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion. *Id.* The court must give the benefit of reasonable doubt to the nonmovant and determine whether a record might be developed that would leave open an issue upon which reasonable minds may differ. *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703, 706; 532 NW2d 186 (1995). Before judgment may be granted, the court must be satisfied that it is impossible for the claim to be supported by evidence at trial. This Court liberally finds a genuine issue of material fact. *Id.*

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* Circuit judge, sitting on the Court of Appeals by assignment.

The trial court did not err in concluding that the condition on defendant's premises presented an open and obvious danger. The "open and obvious" doctrine is defensive, and attacks the duty element that a plaintiff must establish in a prima facie negligence case. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 612; 537 NW2d 185 (1995). Whether a danger is open and obvious depends on whether it is reasonable to expect that an average user with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand),* 198 Mich App 470, 474-475; 499 NW2d 379 (1993). A premises owner owes an invitee a duty to exercise due care to protect them from dangerous conditions. However, where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless the invitor should anticipate the harm despite knowledge of it on behalf of the invitee. *Id.*

The photographs presented show the difference in height between the asphalt and the concrete, approximately one-and-one-quarter-inch, as well as a difference in the colors and compositions of the surfaces. The fact that plaintiff claims that she did not know of the alleged dangerous condition is irrelevant. *Id.* at 475. To survive a motion for summary disposition, plaintiff needed to come forth with sufficient evidence to create a genuine issue of material fact that an ordinary user upon casual inspection could not have discovered the height differential between the concrete and the asphalt. *Id.* Plaintiff failed to come forward with evidence to meet this burden, and therefore, we agree with the court that the alleged dangerous condition was open and obvious.

Plaintiff next argues that the trial court erred in failing to find that a question of fact existed as to whether the dangerous condition on defendant's premises was unreasonable even if plaintiff was aware of it. We disagree.

In general, if a 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, supra* at 611. However, if the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor is required to undertake reasonable precautions. *Id.*

According to the Court in *Bertrand*, the general rule which has emerged from cases involving steps or varying floor levels is that liability will not lie unless unique circumstances surrounding the area in question made the situation unreasonably dangerous. *Bertrand, supra*. "[W]here there is something unusual about the steps, because of their 'character, location, or surrounding conditions,' then the duty of the possessor of land to exercise reasonable care remains. If the proofs create a question of fact that the risk of harm was unreasonable, the existence of duty as well as breach become questions for the jury to decide." *Id.* at 617.

In response to defendant's motion for summary disposition, plaintiff presented the affidavit of an architect, Karl Greimel. According to Greimel, the parking lot was dangerous because it lacks defined and dedicated walkways for the safe passage of pedestrians, no traffic control or warning

devices are in use and concrete islands at the end of each lane block pedestrian traffic, "unnaturally forcing foot traffic into an area of automobile traffic." Greimel opined that the location of the ridge created by the height difference in the concrete and the asphalt "in an area where pedestrians were already forced to direct their attention to avoiding automobile traffic made the situation unreasonably dangerous."

In our opinion, plaintiff's proofs do not create a question of fact that the risk of harm was unreasonable despite the obviousness of the danger. Essentially, Greimel's affidavit indicates that had the lot been designed differently, plaintiff could have returned to her car by a safer route, one where she would not have had to "direct [her] attention to avoiding automobile traffic." Walking in a parking lot necessarily involves directing attention to automobile traffic. Plaintiff's proofs have not demonstrated that there is something "unique" about the area, "because of its 'character, location, or surrounding conditions,'" *Bertrand, supra* at 614, 615, 617. In other words, the fact that this particular parking lot could have been designed to provide greater safety does not make it *unreasonably dangerous*. Accordingly, we hold that the trial court properly granted defendant's motion for summary disposition.

Lastly, plaintiff argues that the trial court erred in dismissing her claims of negligent design and intentional nuisance by relying on an "open and obvious" defense. We disagree. First, contrary to plaintiffs assertion that the "open and obvious" defense is inapplicable to design defect cases, this Court recently applied the defense to a design defect case in *Mallard v Hoffinger Industries (On Remand)*, 222 Mich App 137; ___ NW2d ___ (Docket No. 194746, issued 3/4/97). Therefore, to the extent that plaintiff pleaded a design defect claim, it was properly dismissed by the court pursuant to MCR 2.116(C)(10). Second, although the plaintiff's complaint contained a count alleging that defendant "intentionally and/or negligently created a nuisance . . .", the substance of the allegations are indistinguishable from plaintiff's negligence claim. The facts as alleged do not support a claim for either a private or a public nuisance. See *Rosario v Lansing*, 403 Mich 124, n 6; 268 NW2d 230 (1978), and Prosser, Torts (5th ed), §§ 86-91. We need not determine whether an "open and obvious" defense is applicable to a nuisance claim inasmuch as allegations in this case failed to state a claim of nuisance. With respect to this claim, defendant was entitled to summary disposition pursuant to MCR 2.116(C)(8).

Affirmed.

/s/ Maureen Pulte Reilly
/s/ Myron H. Wahls
/s/ Nick O. Holowka