STATE OF MICHIGAN

COURT OF APPEALS

DEBRA J. DUNNEBACK,

Plaintiff-Appellant,

v

CEDARVIEW, INC., d/b/a FUNTYME ADVENTURE PARK,

Defendant-Appellee.

UNPUBLISHED
February 24, 1998

No. 198535
Ingham Circuit Court
LC No. 95-081953-NO

Before: Markey, P.J., and Bandstra and Markman, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order granting defendant's motion for summary disposition on her premises liability claim. We affirm.

Defendant operates a miniature golf course where plaintiff went to play. When plaintiff's ball reached the green on the fifth hole, it came to rest next to a rock edging behind which was a short drop-off to a water hazard. Plaintiff moved the ball out from the rocks a couple inches as permitted by the rules. Although there was not room to stand between the ball and the rock edging, plaintiff nevertheless wedged her feet into a contorted position so that she could stand there. As she swung the club to hit the ball, the twisting motion of her body caused her to lose her balance and fall backward into the water hazard, injuring herself. Defendant moved for summary disposition, asserting that the danger was open and obvious and that any defect in the premises had not caused plaintiff to fall.

Plaintiff opposed the motion and presented the affidavit of an expert who opined that the fifth hole was negligently designed in that the rock edging did not have a uniform surface, that there should have been room for golfers to straddle the edging by the water hazard, that there should have been a guard rail to prevent golfers from falling into the water hazard, and that there should have been better lighting. The court granted defendant's motion pursuant to MCR 2.116(C)(10), finding that defendant did not owe plaintiff a duty because any danger posed by the hole was open and obvious.

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party. Summary disposition is appropriate only if the court is satisfied that it is impossible for the nonmoving party's claim to be supported at trial because of a deficiency which cannot be overcome. *Morganroth v Whitall*, 161 Mich App 785, 788; 411 NW2d 859 (1987).

A land owner is subject to liability for physical harm caused to his invitees by a condition on the land only if the owner (a) knows of or, by the exercise of reasonable care would discover, the condition and should realize that it involves an unreasonable risk of harm to his invitees; (b) should expect that his invitees will not discover or realize the danger or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect his invitees against the danger. *Lawrenchuk v Riverside Arena, Inc*, 214 Mich App 431, 432-433; 542 NW2d 612 (1995). This duty is not absolute. *Douglas v Elba, Inc*, 184 Mich App 160, 163; 457 NW2d 117 (1990). It does not extend to conditions from which an unreasonable risk cannot be anticipated or to open and obvious dangers. *Id*.; *Hammack v Lutheran Social Services of Michigan*, 211 Mich App 1, 6; 535 NW2d 215 (1995). Where the danger is known to the invitee or is so obvious that the invitee might reasonably be expected to discover it, the invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). Thus, if the 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. On the other hand, 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. The issue then becomes the standard of care and is for the jury to decide. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995).

Plaintiff's fall was not caused by the irregular surface of the rock edging, the drop-off to the water hazard, the absence of a guard rail by the water hazard, or the lack of adequate lighting. Rather, as plaintiff admitted at her deposition, she fell because she lost her balance as she twisted to hit her ball while her feet were wedged against the rock edging. Her feet were wedged against the edging because plaintiff chose to stand between the edging and the ball even though there was inadequate room to stand there. Given that plaintiff realized that there was no room for her to stand between the ball and the rock edging, we find that any danger created by the existence of the rock edging, or the lack of space to straddle the edging, did not create an unreasonable risk of harm. To the extent plaintiff's expert implied that such a danger was unreasonable, we find that defendant did not have reason to anticipate that a golfer who, like plaintiff, was aware of the lack of space in which to stand between the edging and the ball would nevertheless place herself in such an awkward position that she could not hit the ball safely. Because this accident was caused by plaintiff's failure to exercise reasonable care for her own safety and not by any unreasonable risk of harm which defendant could reasonably be expected to have anticipated, defendant was entitled to summary disposition.[1]

Affirmed.

/s/ Jane E. Markey
/s/ Richard A. Bandstra
/s/ Stephen J. Markman

[1] While the trial court focuses upon the "open and obvious" nature of the alleged hazard, we prefer to emphasize that defendant could not have had reason to know that plaintiff would choose to stand in a place where she knew she did not have room to stand and, therefore, that the condition is not one for which liability should be imposed in the first place.