

STATE OF MICHIGAN
COURT OF APPEALS

LISA KEEFER and RONALD KEEFER,

Plaintiffs-Appellants,

v

MARK E. MUETH,

Defendant-Appellee.

UNPUBLISHED

January 29, 1999

No. 202675

Wayne Circuit Court

LC No. 96-607776 NO

Before: McDonald, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff¹ Lisa Keefer injured her left knee when she tripped and fell on a cement pad in the backyard of property owned by defendant and rented by plaintiffs. Plaintiffs filed suit against defendant alleging that the two sections of cement did not properly meet resulting in a defect in the cement, and that defendant failed to maintain safe premises, failed to warn, failed to observe, failed to barricade, and failed to repair or replace the defect. The trial court ultimately granted summary disposition in favor of defendant finding that the condition was open and obvious and that the condition was not unreasonably dangerous. On appeal, plaintiffs claim the trial court erred in granting summary disposition because there were genuine issues of material fact regarding whether the condition was open and obvious and whether the condition was unreasonably dangerous under the circumstances.

Appellate review of a motion for summary disposition is de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 210 (1998). A motion for summary disposition relying upon MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek, supra*, p 338. A court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted to it. *Id.* The court must review the record evidence, making all reasonable inferences therefrom, and determine whether a genuine issue of any material fact exists to warrant a trial. *Bertrand v Alan Ford, Inc.*, 449 Mich 606, 617-618; 537 NW2d 185 (1995).

Tenants are invitees of the landlord while in the common areas of the leased premises because the landlord receives a pecuniary benefit for the tenant's presence. *Stanley v Town Square Coop*, 203 Mich App 143, 147; 512 NW2d 51 (1993). A landlord's duty is to exercise reasonable care to protect invitees from known or discoverable unreasonably dangerous conditions on the land that the invitees will not discover or from which they reasonably will fail to protect themselves. *Id.*, pp 148-149. 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. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 95; 485 NW2d 676 (1992). The duty is to protect invitees from unreasonable risks of harm, and the underlying principle is that even though inviters have a duty to exercise reasonable care in protecting their invitees, they are not absolute insurers of the safety of their invitees. *Bertrand, supra*, p 614.

Here, defendant was under no obligation to warn plaintiff of the condition. In other words, plaintiffs have not created a genuine issue of material fact regarding whether the crack in the cement between the cement slabs was not open and obvious. The "rut" or "crack" as described by plaintiffs is an expansion crack between two concrete slabs. A review of the photographs submitted reveals that it is an ordinary expansion crack that is slightly elevated at one end. Even accepting plaintiff's testimony that the elevation is one-half inch, the expansion crack is, by all means, open and obvious. That is, it is objectively reasonable to expect an average user with ordinary intelligence to discover any danger associated with the expansion crack upon casual inspection. *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997).

Plaintiff's deposition testimony does not create a material factual dispute with regard to whether the danger was open and obvious. Her testimony was that she had lived at the house for approximately eighteen months before the accident. She fell on August 12, 1993, at about 2:00 p.m. and it was a sunny day. She testified that she had never been in that area of the backyard before, however, she was aware of the concrete slabs in the backyard. She went to the yard to determine why the dog was barking while she was carrying her ten-month-old daughter in one arm and she was five months pregnant at the time. She further stated that there was a round picnic table on the concrete slab which had been there since they moved in. She walked between the fence and the table and testified that there was nothing that blocked her view of the concrete slab. She testified that she tripped on the raised portion of the expansion crack and fell on her knees. Plaintiff also testified that she was careful because she was pregnant, that she was walking at a normal pace, that she did not know why she did not see the raised portion of the expansion crack, that she was not looking at her feet, that the raised portion of the concrete slab was "not that high," and that she was clearly able to see the expansion crack after the fall because she was looking to see what she tripped over.

This testimony simply does not create a material factual dispute as to whether an ordinary user upon casual inspection could not have discovered the existence of the raised portion of the expansion crack. Plaintiff admitted that nothing blocked her view of the concrete slabs. Further, it is not relevant whether plaintiff had ever seen the raised portion of the concrete or had ever

been on the concrete slab before. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; NW2d (1993). There is no evidence that the nature of the expansion crack was not discoverable upon casual inspection, *id.*, or that there was anything unusual about the concrete slabs and the expansion crack because of their character, location, or surrounding circumstances. *Bertrand, supra*, p 617. Accordingly, the trial court did not err in finding that the expansion crack was an open and obvious condition and that defendant was under no duty to warn of the condition.

Next, there is no material factual dispute as to whether the risk of harm remained unreasonable such that defendant is liable under a failure to maintain or repair theory. Plaintiff admitted that the picnic table had been there since she began leasing the premises. In addition, plaintiff testified that she had common knowledge that in instances where two pieces of concrete come together, one is generally raised above the other and precautions must be taken by a pedestrian when raised concrete is involved. Moreover, it is highly questionable whether the condition of the concrete can even be properly characterized as a defect because a review of the photographs shows that there is nothing at all unusual about the expansion crack. *Id.* Therefore, plaintiffs failed to show that the circumstances surrounding the condition created an unreasonable risk of harm.

Affirmed.

/s/ Gary R. McDonald

/s/ Kathleen Jansen

/s/ Michael J. Talbot

¹ In this opinion, use of “plaintiff” in the singular will refer solely to Lisa Keefer because she is the injured party and her husband Ronald Keefer’s loss of consortium claim is wholly derivative.