

STATE OF MICHIGAN
COURT OF APPEALS

KAREN SUE DONNELLY,

Plaintiff-Appellee,

v

LAKESIDE MALL and ROUSE COMPANY,

Defendants-Appellants.

UNPUBLISHED

March 29, 2005

No. 252327

Macomb Circuit Court

LC No. 02-005835-NO

Before: Murray, P.J., and Markey and O’Connell, JJ.

PER CURIAM.

Defendants appeal by leave granted from the trial court’s order denying their motion for summary disposition under MCR 2.116(C)(10). We reverse. This appeal is being denied without oral argument pursuant to MCR 7.214(E). This case arose when plaintiff was walking her children across the driving lane between a mall and its parking lot. She stepped in a pothole and allegedly injured her foot and back.

We review de novo a trial court’s decision to grant summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Id.* To establish a prima facie case of negligence, a plaintiff must prove: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Fultz v Union-Commerce Associates*, 470 Mich 460, 463; 683 NW2d 587 (2004). Here, only the element of duty is at issue.

It is undisputed that plaintiff was an invitee when the accident occurred. “In general, 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). This duty does not extend to the removal of dangers that are open and obvious. *Id.* Whether a danger is open and obvious depends upon whether it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection. *Hughes v PMG Building*, 227 Mich App 1, 10; 574 NW2d 691 (1997). “[P]otholes in pavement are an ‘everyday occurrence’ that ordinarily should be observed by a reasonably prudent person.” *Lugo, supra* at 523.

Plaintiff first contends that the pothole was not open and obvious because it was “virtually color camouflaged.” However, plaintiff also testified that the pothole was not covered by anything, and photographic evidence contradicts her subjective claim. The drive’s concrete is light in color, contrasting with the dark cracks that have formed around the hole’s periphery and the dark asphalt apparently put in the hole in an attempt to fill it. While the hole itself runs along a seam in the concrete, the seam noticeably widens at the point of the hole, and the hole itself is large. Plaintiff stated that she estimated the pothole to be about eighteen to twenty-four inches long, probably twelve to fourteen inches wide, and maybe a little less than twelve inches deep. As the trial court indicated after viewing pictures of the pothole, it was “clearly a big hole.” Because plaintiff does not dispute the pictorial evidence, her subjective opinion that the pothole was camouflaged fails to raise a material question of fact regarding whether the pothole was open and obvious.

Plaintiff also indicated that she was watching out for traffic because she was guiding her two small children across the street, yet she testified that if she had noticed the pothole, she could have walked over it. In denying summary disposition, it appears from the record that the trial court improperly focused on the size of the pothole and on plaintiff’s distracted state at the time of the fall. The correct standard requires the court to focus on whether it would be reasonable for an ordinary person to discover the condition upon casual inspection. *Hughes, supra* at 10. Here, after reviewing the photographs and testimony regarding the overall size of the pothole, we find that it was clearly visible by a person of average intelligence upon casual inspection.

Also, contrary to plaintiff’s alternative argument, there existed special aspects to the pothole that rendered it unreasonably dangerous notwithstanding its open and obvious condition. *Lugo, supra* at 523. “[O]nly those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove [the pothole] from the open and obvious danger doctrine.” *Id.* at 517-518. Plaintiff again argues that the condition was difficult to detect, adding that both mall guests and automobiles were funneled to the pothole’s location and that it experienced heavy parking lot traffic. However, these factors did not form a unique situation leading to an unreasonably high likelihood of harm. Plaintiff fails to present any evidence that the pothole encumbered a substantial portion of other mall guests or that it was even difficult to avoid. Furthermore, the pothole did not pose the type of severe threat to life and limb that our Supreme Court envisioned in *Lugo’s* illustration of the deep, open, and unguarded pit. *Id.* at 518. Therefore, the pothole did not possess any special aspects that would impose a duty on defendants to remedy the open and obvious defect.

Reversed and remanded for entry of judgment in favor of defendants. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Peter D. O’Connell