

STATE OF MICHIGAN
COURT OF APPEALS

CAROL SIORAKES,

Plaintiff-Appellant,

V

TARGET CORPORATION,

Defendant-Appellee.

UNPUBLISHED

April 26, 2011

No. 295034

Macomb Circuit Court

LC No. 2008-004121-NO

Before: K. F. KELLY, P.J., and GLEICHER and STEPHENS, JJ.

K. F. KELLY, J. (*dissenting.*)

I respectfully dissent. In my view, the trial court properly granted summary disposition in favor of defendant albeit for the wrong reasons.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the non-moving party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

I would affirm the trial court's decision to grant defendant's motion on the alternative grounds argued by defendant. See *Vanslebrouck v Halperin*, 277 Mich App 558, 565; 747 NW2d 311 (2008). The record evidence establishes that the condition of the sidewalk was open and obvious and did not present an unreasonable risk of harm, thereby precluding liability.

A premises possessor owes a duty to use reasonable care to protect invitees from an unreasonable risk of harm caused by dangerous conditions on the premises unless the dangers are open and obvious. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). “[W]here 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 he should anticipate the harm despite knowledge of it on behalf of the invitee.” *Id.* at 516, quoting *Riddle v McLouth Steel Prod Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992).

In *Novotny v Burger King Corp (On Remand)*, 198 Mich App 470, 474; 499 NW2d 379 (1993), our Supreme Court noted that:

[A] person can observe in what direction a sidewalk goes, and what incline the sidewalk presents, upon casual inspection. There is no indication in this case that [the] plaintiff could not have determined the existence of the handicap access ramp, or the incline of that ramp, had she inspected the sidewalk in front of her.

The same applies in this case. Although the photographs are the best evidence that the difference in the pavement was open and obvious, they are not the only evidence. Plaintiff's husband testified he found the location by "eyeballing." The unnamed witness immediately identified the location when plaintiff asked what she tripped over. Plaintiff's view was not blocked, nor was there anything to distract her. Nothing covered or otherwise concealed the pavement, and it was not dark outside. Thus, defendant has no duty to act unless the open and obvious condition of the sidewalk was unreasonably dangerous.

Where special aspects of a condition make even an open and obvious risk unreasonably dangerous, the possessor must take reasonable steps to protect invitees from harm. *Lugo*, 464 Mich at 517. Special aspects are those that "give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided." *Id.* at 519. Neither a common condition nor an avoidable condition is uniquely dangerous. See *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 8-9; 649 NW2d 392 (2002).

The minor height difference due to the slope of the pavement is a common condition that is not uniquely dangerous. In fact, examination of the photographs attached to the briefs leads to the conclusion that this sidewalk presents no unreasonable risk of harm to pedestrians. The condition here is easily avoided by picking up one's feet more than half an inch. Plaintiff's basic argument is that the patch made the sidewalk slope more than she expected: this argument was expressly rejected in *Novotny*.

I would affirm.

/s/ Kirsten Frank Kelly