STATE OF MICHIGAN

COURT OF APPEALS

ASHANIA ATLAS and DONNELL ATLAS, Plaintiffs-Appellants,	UNPUBLISHED July 24, 2018
v	No. 339988 Kalamazoo Circuit Court
MICHIGAN COMMERCIAL REAL ESTATE LLC, Defendant-Appellee.	LC No. 2016-000386-NO

Before: HOEKSTRA, P.J., and MURPHY and MARKEY, JJ.

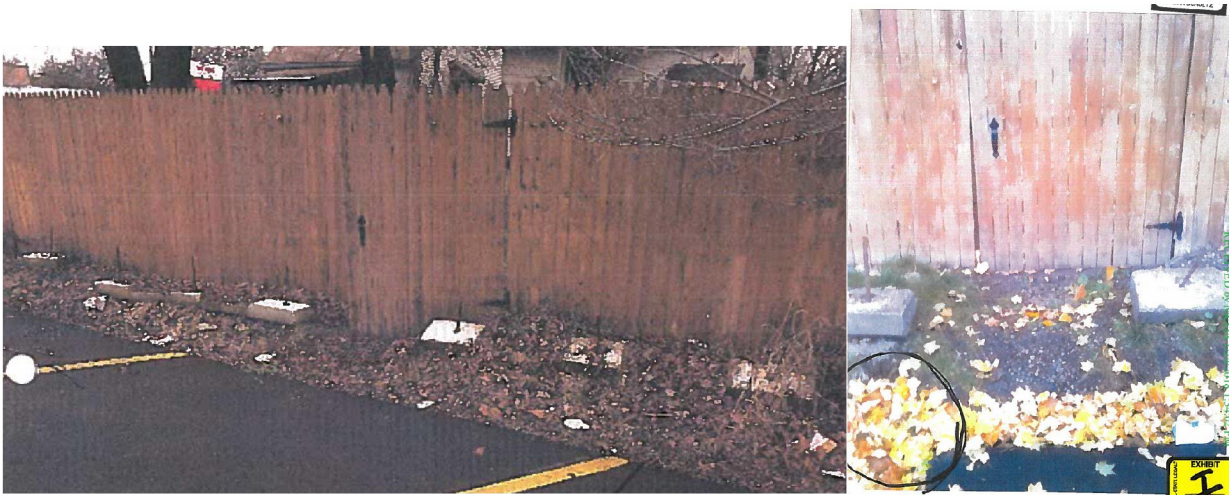
PER CURIAM.

Plaintiffs[1] appeal as of right the trial court's grant of summary disposition under MCR 2.116(C)(10) in favor of defendant. Because reasonable minds could conclude that plaintiff fell in a hole covered by leaves that was not open and obvious, we reverse the grant of summary disposition to defendant and remand for further proceedings.

This case arises out of a trip and fall that occurred on defendant's property on October 31, 2014. Defendant owned the property and leased it to Michigan Works. On the day of the incident, plaintiff intended to print resumes and look for job opportunities at Michigan Works. According to plaintiff, on his way to Michigan Works, his uncle called him to offer to pay back a loan. Coincidentally, plaintiff's uncle lived adjacent to the Michigan Works's parking lot. Therefore, plaintiff asked his uncle to meet him at Michigan Works. Plaintiff parked his car in the Michigan Works parking lot and started walking to the building; however, his uncle called out to him from next door. Plaintiff walked through a break in the fence and briefly spoke to his uncle in his uncle's backyard. The uncle paid plaintiff and plaintiff then offered to show his uncle the work he had recently had done on his car. Plaintiff's uncle opened a gate in the fence that separated the parking lot from the uncle's backyard. Plaintiff walked through the gate first, took a couple of steps, and fell when he stepped in a hole that was covered by leaves. According to plaintiff, the hole was about 12 inches deep and wide enough for his foot to fit inside. The

[1] Plaintiffs Ashania Atlas and Donnell Atlas will be referred to collectively as "plaintiffs" in this opinion. References to "plaintiff" are to Donnell Atlas in particular.

area of plaintiff's fall is shown in the following photographs, which were attached to defendant's brief on appeal:



At the time of plaintiff's accident, there was construction ongoing in another area of the parking lot, and this construction area was blocked off with caution tape and cones. However, in the area where plaintiff fell, there were no cones or caution tape or warning signs. Although there were no cones or caution tape in the area of plaintiff's fall, as seen in the photographs, there were concrete parking bumpers lying upside down in the grass near where plaintiff fell. The parties seem to agree that the hole in which plaintiff tripped was caused by moving the bumpers. Plaintiff stated that he did not see the bumpers until after he fell, but he admitted that the upturned bumpers were "obviously" "unusual."

As a result of his fall, plaintiff sustained serious injuries to his foot. Plaintiff filed a complaint against defendant, claiming that defendant was negligent in failing to fill the hole and in failing to warn, or otherwise protect, plaintiff from the danger. In response, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that the hazard was open and obvious and thus defendant was not liable for plaintiff's injuries. The trial court granted defendant's motion, reasoning that plaintiff should have been aware of the "possibility of [the] existence of a hidden danger underneath the leaves" and that, given the construction work being done on the property, plaintiff should have "exercise[d] an accelerated level of caution."

On appeal, plaintiff argues that the trial court erred by concluding that the hole underneath the leaves was open and obvious based on an expectation that plaintiff should have exercised an "accelerated level of caution" while on defendant's property. Instead, plaintiff maintains that whether the danger was open and obvious requires consideration of what was observable by an average user on casual inspection. Plaintiff asserts that there is evidence that the hole was covered by leaves, and plaintiff argues that a 12-inch deep hole entirely covered by leaves is not observable on casual inspection by a person of ordinary intelligence. We agree.

We review a trial court's ruling on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). "When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all the evidence submitted by the parties in the light most favorable to the non-moving

party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact." *Sisk-Rathburn v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 425, 427; 760 NW2d 878 (2008). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Benton v Dart Props, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006). "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, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). "However, this duty does not generally encompass removal of open and obvious dangers." *Id*.

"The possessor of land owes no duty to protect or warn of dangers that are open and obvious because such dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid." *Hoffner v Lanctoe*, 492 Mich 450, 460-461; 821 NW2d 88 (2012) (quotation marks and footnote omitted). "Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Id*. at 461. "This is an *objective standard,* calling for an examination of the objective nature of the condition of the premises at issue." *Id*. (quotation marks and footnote omitted). In other words, the focus is not on the subject degree of care used by the plaintiff or whether this plaintiff could have, or should have, discovered the danger. *Price v Kroger Co of Michigan*, 284 Mich App 496, 501; 773 NW2d 739 (2009). Instead, the issue is whether the danger was "observable to the average, casual observer." *Id*.

Typically, uneven ground, short drop-offs, and small holes are considered open and obvious hazards without special aspects[2] because they are the types of "everyday occurrence[s] that ordinarily should be observed by a reasonably prudent person," *Lugo*, 464 Mich at 523, and a reasonable person can "readily transverse" these types of hazards without incident, *Blackwell v Franchi*, 318 Mich App 573, 575-576; 899 NW2d 415 (2017). See also *Weakley v Dearborn Heights*, 240 Mich App 382, 385; 612 NW2d 428 (2000). However, there may be circumstances in which an otherwise commonplace, easily observable hole or drop-off cannot be considered open and obvious because it is not discoverable on casual inspection due to the surrounding

[2] "[A]s a limited exception to the circumscribed duty owed for open and obvious hazards, liability may arise when *special aspects* of a condition make even an open and obvious risk unreasonable." *Hoffner*, 492 Mich at 461. Special aspects exist when "(1) the hazard is, in and of itself, unreasonably dangerous or (2) the hazard was rendered unreasonably dangerous because it was effectively unavoidable for the injured party." *Bullard v Oakwood Annapolis Hosp*, 308 Mich App 403, 410; 864 NW2d 591 (2014).

conditions on the property. For example, insufficient lighting may prevent an average user from observing a drop-off on casual inspection. See, e.g., *Blackwell*, 318 Mich App at 578; *Abke v Vandenberg*, 239 Mich App 359, 362; 608 NW2d 73 (2000); *Knight v Gulf & W Properties, Inc*, 196 Mich App 119, 127; 492 NW2d 761 (1992).

In this case, plaintiff injured himself when he stepped into a 12-inch deep hole that was large enough to accommodate plaintiff's entire foot. Under normal circumstances, this type of hole would likely constitute an open and obvious hazard. See *Lugo*, 464 Mich at 523. However, viewing the evidence in a light most favorable to plaintiff, a material question of fact remains as to whether a reasonable person would have discovered the hole on casual inspection given the surrounding conditions on plaintiff's property. See *Blackwell*, 318 Mich App at 577. In particular, plaintiff presented evidence to support the conclusion that the hole was not visible because it was entirely obscured by leaves.[3] Plaintiff testified at his deposition that all he saw was "leaves and the grass;" he did not see the hole. Likewise, plaintiff's uncle testified that the hole was not visible because it was covered with leaves. Plaintiff's wife, who returned to the site of plaintiff's fall to take photographs, testified that she brushed leaves aside to see and photograph the hole. The photographs provided by the parties similarly show leaves covering the ground, and the hole in which plaintiff fell is not readily observable beneath the covering of leaves. Viewed in a light most favorable to plaintiff, there is evidence to support the inference that this case does not involve an ordinary hole that would be discoverable upon casual inspection by an average person with ordinary intelligence. See *Hoffner*, 492 Mich at 460-461. Instead, reasonable minds could conclude that this case involves a hidden danger to which the open and obvious doctrine does not apply. See *Blackwell*, 318 Mich App at 579. Consequently, the trial court erred by granting defendant's motion for summary disposition on this basis.

In reaching this conclusion, we note that the trial court's open and obvious finding depended in large part on the fact that there were overturned, clearly visible parking bumpers near where plaintiff fell and that there was construction work, with caution tape and cones, ongoing in other areas of the parking lot. Based on these circumstances, the trial court concluded that plaintiff should have recognized the possibility of unseen danger lurking beneath the leaves and exercised "an accelerated level of caution" beyond casual inspection. This conclusion is flawed for two reasons.

First, to the extent the trial court focused on the overturned concrete bumpers and the construction in other areas of the parking lot, plaintiff was not injured by the bumpers nor was he in the area of the parking lot that was cordoned off by tape and cones. Instead, plaintiff fell in a hole covered by leaves, and we are not prepared to say as a matter of law that this hole was open and obvious, despite being obscured by leaves, simply because there was ongoing work on the

[3] Cf. *Lugo*, 464 Mich at 521 (applying the open and obvious doctrine to a "common pothole" when "the evidence presented to the trial court simply does *not* allow a reasonable inference that the pothole was obscured by debris at the time of plaintiff's fall") (emphasis added).

property.[4] Indeed, if anything, the presence of cones and tape preventing access to other areas of the property could reasonably lead average users of ordinary intelligence to believe that an area free from tape and cones was safe. Second, and more importantly, even if a jury might potentially conclude that plaintiff should have done more for his own safety when walking on a property with ongoing construction, his failure to investigate a potential hazard beneath the leaves is a question of comparative negligence, not an indication that the hole was open and obvious such that defendant was without a duty to plaintiff. See *Blackwell*, 318 Mich App at 578. See also *Lugo*, 464 Mich at 522 n 5 ("The level of care used by a particular plaintiff is irrelevant to whether the condition created or allowed to continue by a premises possessor is unreasonably dangerous."). In other words, the open and obvious doctrine focuses on what is observable on casual inspection based on the condition of the premises and the hazard as they existed at the time the plaintiff encountered them. *Blackwell*, 318 Mich App at 578. Casual inspection does not require a plaintiff to undertake steps to alter the condition of the property to ensure that there are no unseen hazards. Cf. *id*. (finding that the plaintiff's failure to turn on a light did not render an unseen drop-off an open and obvious hazard). Thus, it cannot be concluded that the hole was open and obvious simply because it would have been discoverable had plaintiff exercised greater care and removed the leaves that prevented discovery of the hazard on casual inspection. See *id*.

Finally, we note that, on appeal, as an alternate ground for affirmance, defendant argues that, even if the danger is not open and obvious, defendant owed plaintiff no duty, except to refrain from injuring plaintiff by willful and wanton misconduct, because plaintiff was a trespasser on the property at the time of his fall. In particular, in asserting that plaintiff was a trespasser at the time of his fall, defendant argues that plaintiff went beyond the area open to invitees by walking on the grass between the parking lot and his uncle's property. Additionally, defendant contends that plaintiff's reason for being on the property at the time of the fall—to visit with his uncle and show him changes to plaintiff's car—were not commercial reasons. We disagree.

"[A] landowner's duty to a visitor depends on that visitor's status." *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). Here, defendant contends that plaintiff may have been an invitee when he arrived at Michigan Works, but that he became a trespasser on the property when visiting with his uncle. "A trespasser is a person who enters upon another's land, without the landowner's consent." *Id*. (quotation marks and citation omitted). In comparison, "invitee status must be founded on a commercial purpose for visiting

[4] Relying on unpublished caselaw, the trial court also suggested, and defendant argues on appeal, that the danger of possible unforeseen hazards beneath leaves is open and obvious. As unpublished decisions, these cases are nonbinding. MCR 7.215(C)(1). In any event, we do not read these cases to suggest that *any* hazard covered by leaves is open and obvious by virtue of being leaf-covered. In our view, while leaves may pose some obvious hazards, such as slipping on the leaves themselves or tripping on slightly uneven ground beneath the leaves, the danger of stepping into a 12-inch deep hole on what otherwise appears to be relatively level ground scattered with leaves is not open and obvious.

the owner's premises." *Id*. at 607. "[A]n invitee is entitled to the highest level of protection under premises liability law," *id*. at 597, while "[t]he landowner owes no duty to the trespasser except to refrain from injuring him by wilful and wanton misconduct," *id*. at 596.

A person who enters land as an invitee may lose invitee status by entering a particular area of the property without permission or invitation. *Constantineau v DCI Food Equip, Inc*, 195 Mich App 511, 515; 491 NW2d 262 (1992). But, in this case, defendant cannot seriously contend that plaintiff entered an area where visitors were not invited or permitted. Plaintiff walked on grass bordering defendant's parking lot. Defendant offers no evidence that invitees were forbidden from stepping on the grass, and there is no merit to defendant's suggestion that plaintiff lost invitee status by walking on the grass. See *id*.; 2 Restatement of Torts, 2d, § 332, comment *l*, pp 181-183. To the extent defendant contends that plaintiff's activities—visiting his uncle and inviting his uncle to come look at his car—were not commercial reasons for being on the property, defendant's argument ignores the fact that plaintiff was ultimately on the property for the purpose of going to Michigan Works, and as a visitor to Michigan Works, plaintiff plainly had a commercial reason for visiting the property. *Stitt*, 462 Mich at 607. See also *Petraszewsky v Keeth*, 201 Mich App 535, 541; 506 NW2d 890 (1993) (recognizing that standard of care owed by a landlord with respect to a tenant's guests is that of invitee). Further, plaintiff was injured while walking on the property—not by showing his car to his uncle—and defendant points to nothing about *walking* that is unusual or inconsistent with the scope of plaintiff's invitation. See 62 Am Jur 2d Premises Liability, §§ 105-106. In short, we are not persuaded by defendant's assertion that plaintiff lost his invitee status by walking on the grass or inviting his uncle to look at his car. Moreover, even assuming that plaintiff's brief tangent from his purpose for visiting Michigan Works deprived him of invitee status, defendant offers no authority for the proposition that this would render plaintiff a trespasser as opposed to a licensee. See generally *Stitt*, 462 Mich at 596. Overall, there is no merit to defendant's claim that plaintiff was a trespasser at the time of his fall, and defendant was not entitled to summary disposition on this basis.

Reversed and remanded for further proceedings. We do not retain jurisdiction. Having prevailed in full, plaintiff may tax costs pursuant to MCR 7.219.

/s/ Joel P. Hoekstra
/s/ William B. Murphy
/s/ Jane E. Markey