

STATE OF MICHIGAN
COURT OF APPEALS

SHIRLEY ANDERSON and ROBERT
ANDERSON,

UNPUBLISHED
November 2, 2001

Plaintiffs-Appellants,

v

No. 225699
Macomb Circuit Court
LC No. 99-000396-NO

MONTGOMERY WARD & COMPANY,

Defendant-Appellee.

Before: Doctoroff, P.J., and Wilder and Chad C. Schmucker*, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting defendant summary disposition in this premises liability action. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff Shirley Anderson (plaintiff) went to defendant's store at Universal Mall in Warren. She spoke to a salesman about a purchase she had made but had not yet been delivered. The salesman directed plaintiff to go to package pick-up and told her that to get there she had to use an outside sidewalk. Plaintiff went out to walk on the sidewalk and noticed that it was torn up. It had been patched in many places. She described it as "ragged" and a mess and as not having been maintained. She could see the whole distance of the sidewalk. She walked carefully, but glanced down at the bill she had in her hand. Her foot caught on a rise in a concrete slab, and she fell forward, suffering injuries.

Plaintiff looked at where she had fallen and discovered that one slab of the sidewalk had dropped down lower than the abutting one. She caught her foot at that spot and fell. She presented evidence that the difference in the rise between the two slabs of concrete was 7/8 inch.

Defendant moved for summary disposition, arguing that it owed no duty to warn plaintiff because the condition was open and obvious. The trial court agreed with defendant, noting that the sidewalk presented no unusual characteristics and did not pose an unreasonable risk. It granted defendant's motion for summary disposition.

* Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiff argues that the condition was not open and obvious and that if it was, there exists genuine issues of material fact as to whether exceptions to the open and obvious doctrine apply. We disagree.

A decision on a motion for summary disposition is reviewed de novo. *Singerman v Municipal Serv Bureau, Inc*, 455 Mich 135, 139; 565 NW2d 383 (1997). A motion brought pursuant to MCR 2.116(C)(10) (no genuine issue of material fact) tests the factual support for a claim. To rule on the motion, the trial court must consider the pleadings, affidavits, depositions and all other documentary evidence submitted by the parties. MCR 2.116(G); *Singerman, supra*. The court must view the evidence and all reasonable inferences drawn from the evidence in favor of the nonmoving party, giving the nonmoving party the benefit of any reasonable doubt. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). The reviewing court must “determine whether any genuine issue of material fact exists in order to prevent entering a judgment for the moving party as a matter of law.” *Id*.

An invitor has a duty “to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land’ that the landowner knows or should know the invitees will not discover, realize or protect themselves against.” *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995), quoting *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988). If a condition is open and obvious, the invitor generally has no duty to warn an invitee of the condition. *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 10; 574 NW2d 691 (1997). The question whether a condition is open and obvious depends on whether it is reasonable to expect an average person of ordinary intelligence to discover the dangerous condition upon casual inspection. *Id*. However, even if a condition is open and obvious, the invitor still may have a duty to protect an invitee against foreseeably dangerous conditions:

[I]f the particular activity or 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. [*Bertrand, supra* 449 Mich 611 (emphasis in original).]

The *Bertrand* Court explained that if there is something unusual about the ordinary and obvious condition, because of its “character, location, or surrounding conditions,” then the possessor retains a duty to exercise reasonable care. If the evidence creates a question of fact whether the risk of harm was unreasonable, the possessor’s duty and breach of that duty become jury questions. *Id*. at 616-617.

Our Supreme Court has most recently addressed the open and obvious doctrine in *Lugo v Ameritech Corp*, ___ Mich ___; ___ NW2d ___ (2001). It summarized the general rule:

[A] premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to

undertake reasonable precautions to protect invitees from that risk. [*Id.*, slip op at 4.]

It further explained that “only 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 that condition from the open and obvious danger doctrine.” *Lugo, supra* at 7-8.

The facts reveal that plaintiff visited defendant’s store in the early afternoon of a clear, dry day in March. The pavement was dry; it was not covered by snow or ice. Plaintiff noticed the overall condition of the sidewalk. The photographs reveal that the concrete slabs had settled and cracks and gaps had been filled in many places. An average person of ordinary intelligence would have discovered the condition of the sidewalk on casual inspection. We find the condition of the sidewalk was open and obvious.

Only if the risk of harm was unreasonable despite the open and obvious nature of the condition does the invitor have a duty to undertake reasonable precautions to protect invitees from the risk. *Bertrand, supra*. However, the special aspects required to preclude application of the open and obvious doctrine must “give rise to a uniquely high likelihood of harm or severity of harm.” *Lugo, supra*. There are no special aspects that create a uniquely high likelihood or severity of harm if the risk of the uneven slabs is not avoided. This condition presents little risk of severe harm. See *Id.* at 8. Therefore, the condition was not unreasonably dangerous.

We reject plaintiff’s argument that she was distracted by the repaired areas of the sidewalk and therefore missed the condition that existed in an area that had not been repaired. The evidence does not support this assertion. Plaintiff testified that she tripped and fell when she looked at her store bill.

Affirmed.

/s/Martin M. Doctoroff
/s/Kurtis T. Wilder
/s/Chad C. Schmucker